



Sir Armine Wodehouse Bart.



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PROCEEDINGS

John T. Smith, Bar.

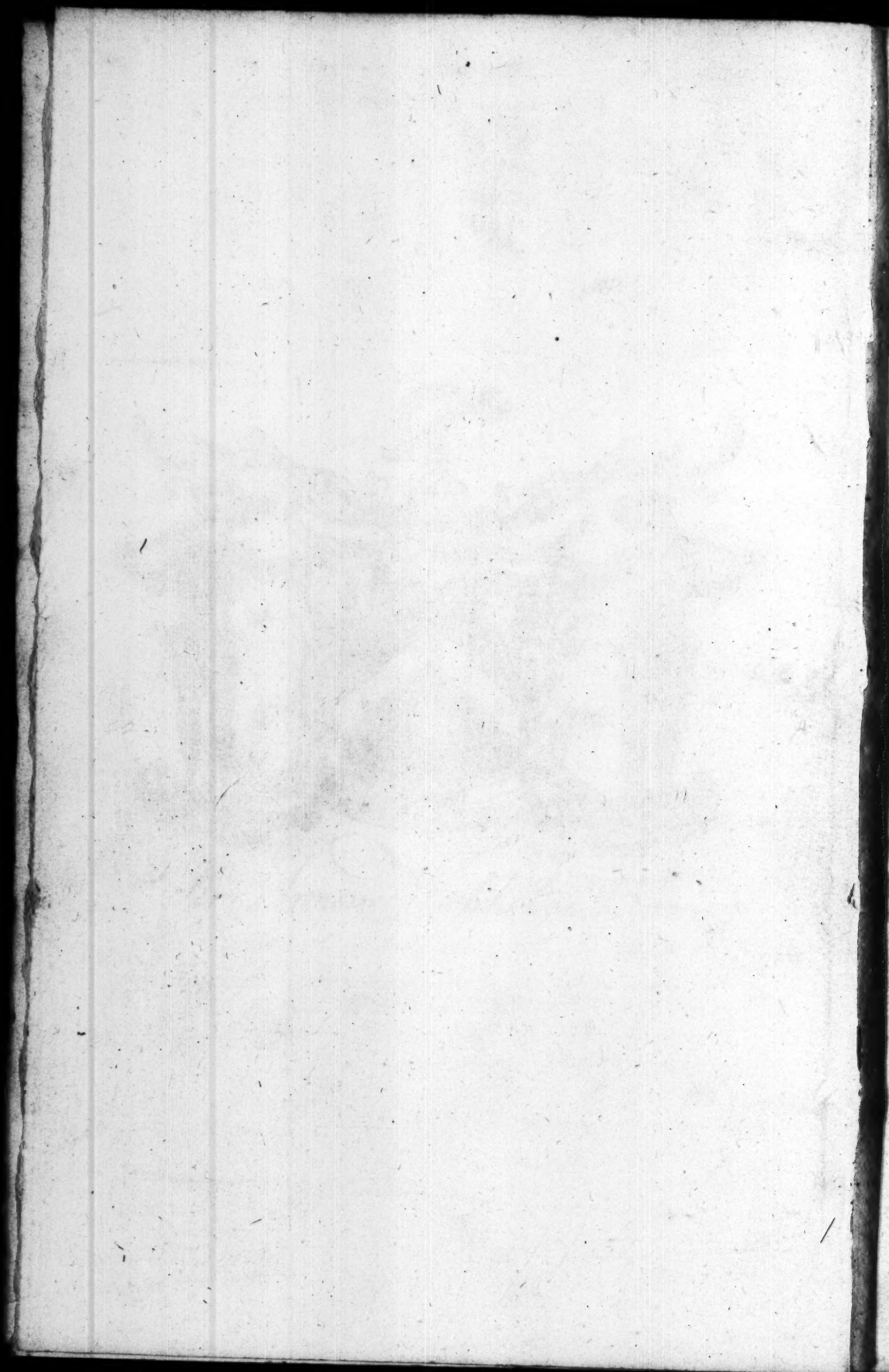
Bill of Lumber

High Treason

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THE
PROCEEDINGS
AGAINST
Sir *John Fenwick*, Bar.
UPON A^k
Bill of Attainder
FOR
High Treason.

TOGETHER

With a Copy of a LETTER sent
by Sir *John Fenwick* to his Lady, upon
his being Taken in *Kent*.

AS ALSO

Of the PAPER delivered by him to the
Sheriffs of *London* and *Middlesex*, at the
Place of his *Execution*.

Printed in the Year, 1702.

THE
PROCEEDINGS
AGAINST
Sir John Fennick Bart
UPON A
Bill of Attainder



High Court

TOGETHER
With a Copy of the LETTER
by Sir John Fennick to his Lady, upon
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Of the PAPER delivered by him to the
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Printed in the Year 1702

THE
PROCEEDINGS
AGAINST
Sir John Fenwick Bart &c.

Veneris 6. die Novembris, 1696;

ADmiral *Russel* Acquainted the House of Commons, That His Majesty had given leave to lay before the House several Papers in the Nature of Informations of *Sir John Fenwick*, in which, He, and several other Persons of Quality were Reflected on; and desir'd that they might be brought up to the Table and Read, and that he might have an Opportunity to justifie himself, or if he did not, that he might fall under the Censure of the House. And thereupon, Mr. Secretary *Trumbal* being present, did say, That he had His Majesty's Leave to lay those Papers before the House, and, if the House pleased, he would bring them up to the Table.

And accordingly, (the House shewing a general Inclination for it,) they were brought up to the Table and Read, (being the Account he gave of the Late Plot under his own Hand, and his Examination taken by Mr. *Vernon*;) and after the same were Read the House Ordered, That *Sir John Fenwick* should be brought immediately before them, and that no Person should in the mean time Speak with him, or give or receive any

B.

Paper

Paper from him. And the House further Ordered, That the Lord Cutts, Sir Henry Hobart, and Mr. Norris, Three of their Members, should see their Order executed.

And in the mean time Adjourned to the Afternoon.

About Five a Clock in the Afternoon Sir John Fenwick was brought with a strong Guard (which the Lord Cutts had taken Care for) to the House, and being brought to the Bar, Mr. Speaker spake to him thus,

Mr. Speaker. Sir John Fenwick, the House understand that you have shewed some Inclinations to make a Discovery of the Designs and Practices of the Enemies of the Government; you have now an Opportunity to do it, and the House require it from you, That you make a full and ample Discovery of all you know of that Matter.

Sir John Fenwick. Mr. Speaker, I suppose the House is not Ignorant of my Circumstances; I am Indicted of High-Treason, and have been Arraigned: What I have done to serve the King and Nation His Majesty knows. It hath been Communicated to him by his Privy-Council. I do not know but what I say may hurt my self; and therefore I desire that I may have some Security for my Self, and I am willing to tell the full of all I know.

Mr. Speaker. Sir, if you please to withdraw for the present, the House will send you their Pleasure.

Sir John Fenwick withdrew. Was called in again.

Mr. Speaker. Sir John Fenwick, since you withdrew, the House have consider'd of what you said at the Bar. They do not think what you have said is an Answer to what they require: They do expect a full and candid Confession from you of what you know, and they think that the best way for you to obtain the favour of the House is to deal ingenuously with them.

Sir John Fenwick. Sir, I am in the Hands of the Law, and I would not do any thing that His Majesty might be Angry with me, for I do not know it is with His Majesty's

Majesty's Consent ; I have Acquainted him fully with all I know of the Matter ; this is all the Account I can give you at this time. 'Tis a dangerous Point that I am under ; I know not but I may come to my Tryal in a few Days, and what I may say may rise up against me in a Court of Judicature ; I Humbly propose it to the House, if they do not think it a hard Case for me to make any Confession here, when His Majesty hath all that I know. I shall be very ready to do what this Honourable House pleases to Command me, but I desire this House will consider my Circumstances ; I would not offend the King, nor offend this House.

Thereupon, Mr. *Speaker* again spake to him to withdraw. And being withdrawn, the House Debated, Whether they should acquaint him with their having those Papers of Informations. But they did not think fit to do it, because, they thought those Papers were a Contrivance, and made by others for him, and that the best way to get the Truth out of him would be for him to tell his own Story. And that if the House should let him know they had those Papers, he would only refer to those Papers, as, it was said, he had lately done, when he was examined by the King and Council.

'Twas also Debated, Whether there should be any threatening Words used to him, but they thought that not proper, for his Confession ought to be free and natural. It was also mentioned, Whether they should take notice of His Majesty's Consent ; but that was not thought fit, being thought derogatory to the Privileges of the House : So the House Ordered him to be called in again, and Mr. *Speaker* delivered the Sense of the House to him in these Words.

Sir John Fenwick at the Bar.

Mr. *Speaker.* Sir *John Fenwick*, The House has considered of what you have said, to excuse your making a Discovery of your knowledge of the Designs and Practices of the Enemies of the Government, and they think

think what you stand upon is only an Excuse. They think you have no Reason to apprehend the King should be Angry with you for making any Discovery to this House, this being the proper Place to Enquire of all things that relate to the King and Government, especially His Majesty's Safety; and you ought to discover to them what you know: As to what you stand upon, That you should not be prejudiced by what you Discover here, I am Commanded to tell you, They do take notice by what you have said here, That you have already, notwithstanding what you say, Discovered it to the King and Council; and they Command me to tell you, That you have no Reason at all to apprehend, that you shall suffer any thing if you make a full and free Discovery here, no Man that ever did so, and dealt candidly with this House, ever did. 'Tis in your Power to deserve the Favour of the House. 'Tis Requir'd by the House, that you make a Discovery, and this is the last time that you are like to be asked to do it.

Sir John Fenwick. Mr. Speaker, I know not what Answer to make to this House, I would not willingly offend it. What I have informed the King is a great deal, and a Man would have some little time to recollect himself; and I have been kept a very Close-Prisoner, and had no conveniency of Pen, Ink, and Paper. 'Tis hard to remember just of a sudden, and I would willingly be secure, His Majesty will not be Angry with me; I was in hopes that His Majesty would have Informed the House himself, he hath all that I know; My Circumstances are hard, I am in danger every day to be Try'd, and I desire to be Secur'd, that what I say shall not rise up in Judgment against me. 'Tis hard to make me accuse my self under these Circumstances, and very hard to put me on it now.

Mr. Speaker. As to what you say relating to the fear of His Majesty's Displeasure, and the other Excuse, you have had your Answer already. As to what you say relating

relating to time, if you will now Declare what you know and remember, the House will take into Consideration, whether they will give you farther time to make up the rest.

Sir John Fenwick. Sir, His Majesty hath all exactly, 'tis impossible for me to inform you of it without Accusing my self; I do not really know what to ask but a little time, if you would please to give it me.

Mr. Speaker. Sir, you know already what the House require of you.

Sir John Fenwick. I do, but 'tis no Excuse that I have made; what I have told is Truth, to the best of my knowledge; I am not very good at Speaking, and if I might have a little time, I shall do what they please to Command me.

Mr. Speaker. If that be all you have to say, if you please to withdraw, you shall know the pleasure of the House.

Sir John Fenwick. Sir, I desire the House will consider of it.

Sir John Fenwick withdraws. Is called in again.

Mr. Speaker. *Sir John Fenwick,* This House have considered what you stood upon when you were here last, that your Memory was bad, and that you desired time, but the House think it a Matter of great Moment to the King and whole Nation, That those that are their Enemies should be discovered as soon as possible; and this being a Matter within your knowledge, the House do not think fit to give you time; but if they find by your Discovery, that you deal Candidly and Ingenuously with them, and have told them as much as you know upon your Memory, they will consider of your Request of giving you time for the rest.

Sir John Fenwick. When first I spake to the *Privy-Counsellor*, I proposed to him, whether I might have a Pardon without being an Evidence against any Man, and in that Case I would serve the King so as to tell him all that I knew. It was upon Honour that I did

it to him, and he took the Words in Writing from me, and sent them to the King in *Flanders*: The King's Answer was, That he made no Objection as to my being an Evidence, nor his giving me a Pardon; but that I could expect no Pardon till he knew what I could say; upon that, I was encouraged to do what I did for His Majesty's Service: And I have found in all my Business since, whatever I do or say, the Answer is, 'Tis not Satisfactory, and I am where I was. When this was done, there was a Message sent to me from the *Lords Justices*, That this was not Satisfactory, and I must tell all I know: Now when a Man hath told all he knows, and this must still be the Answer, 'tis very hard. The King's Answer was, That I should more fully make good what I had said. Sir, I did afterwards explain what I had informed that Honourable Person, and still it was not Satisfactory. I hope I shall not find this from this Honourable House; I am upon my Life, and I hope this House will consider of it; I know this House is good Security if I had it, but till I have it I am under these Circumstances, and I may at last be told all is not Satisfactory; I desire the House will please to consider of it.

Mr. Speaker. Sir, you know the Pleasure of the House, you know what they Require of you.

Sir John Fenwick. I am very unwilling to Offend the House, but there are very hard Circumstances, to be told when I have done all I can, 'Tis not Satisfactory.

Mr. Speaker. Sir, you know what the House does expect, you must either give them Satisfaction in it, or withdraw.

Accordingly he withdrew.

And a Motion was made for Leave to bring in a Bill to Attaint Sir *John Fenwick* of High-Treason, and after a Debate thereupon, the House divided.

Yeas ——— 179.

Noes ——— 61.

So it passed in the Affirmative. And *Mr. Att. Gen.* and *Mr. Sol. Gen.* were Ordered to prepare and bring in the Bill.

Lune

Lune 9. die Novembris, 1696.

The Bill for Attainting Sir *John Fenwick* of High-Treason was Presented to the House, by *Mr. Soll. Gen.* and after a long Debate of several hours, the Question was put for the second Reading of it; whereupon, the House divided.

Yeas ——— 196.

Noes ——— 104.

So it Passed in the Affirmative, and *Friday Morning* was appointed for it.

The same Day the House Ordered, That Sir *John Fenwick* should have a Copy of the Order for Reading the Bill a Second time, and a Copy of the Bill, and that he should be allowed Pen, Ink, and Paper. And that *Mr. Vernon* should then produce a Letter written by Sir *John Fenwick*, Of which he did on *Friday* last inform the House.

And further Ordered, That *Mr. Attorney General* and *Mr. Solicitor General*, should prepare and produce the Evidence against him.

Martis 10. die Novembris, 1696.

Mr. Speaker Acquainted the House, That he had in the Chair Received a Letter from Sir *John Fenwick*. Which was Read. And was in these Words,

Newgate, Novem. 10.

S I R,

I Would have Addressed my Self in the Humblest Manner I could to the Honourable House of Commons, from whom I Received a Copy of a Bill against me with their Order; but my Keeper will not Carry any Paper from me but to your Self, to whom I durst not presume to send a Petition to deliver for Me. Therefore I Beg the Favour you will Please to Acquaint the House, That it is my Humble Petition to them, That they would give Leave for my Counsel, Sir Francis Pemberton, Sir Thomas Powys, and Sir Bartholomew Shower, to come to me, with my Solicitor, Christopher Dighton, to Advise with alone. The Keeper will not so much as let me send the Copy of the Bill and order to my Solicitor, so it is of no use to me: I Humbly Beg they will Please to give Order, That I may have all Assistance that is neces-

sary for me, and that you will Pardon this Trouble from,
Sir,

Your most Humble Servant,

John Fenwick.

Upon this Letter, the House did readily allow Sir *John Fenwick* the Counsel he desired, and that they might be alone with him; and after some Debate, did give Leave that he might have the Solicitor he desired, tho' it was said his Solicitor was a very great *Jacobite*; and it was insinuated, That he was suspected to be concerned in the Escape of *Goodman*; but it was also said, That he had been made use of as his Solicitor to prepare for his Tryal, and before that, in other Matters, and so that it might not be thought that there was any Hardship upon him, in that respect the House thought fit to allow *Mr. Dighton* to be his Solicitor.

Jovis 12 die Novembris, 1696.

A Petition was Presented from Sir *John Fenwick* as follows.

To the Honourable the Knights, Citizens, and Burgesses in Parliament Assembled.

The Humble Petition of Sir *John Fenwick*, Bar.

Sheweth,

THAT there being a Bill of Attainder brought into this House for the Attainting of your Petitioner of High-Treason, and your Petitioner is advised, That there are many weighty Reasons to be offered against the said Bill.

Your Petitioner therefore most Humbly Prays, That your Honours will be Pleased to hear him by his Counsel against the Passing of the said Bill at the Bar of this Honourable House; and to appoint such time for the same, as to your Honours shall seem meet. And your Petitioner shall ever Pray, &c.

J. Fenwick.

Thereupon it was Ordered that Sir *John Fenwick* be allowed two Counsel at the Bar of the House to make his Defence.

Veneris

Veneris 12 die Novembris, 1696.

Mr. *Speaker* this day Acquainted the House, that he had the Night before (after he came Home) received a Letter from Mr. *Fuller*, which he thought fit to Acquaint the House with, but the said Mr. *Fuller's* Character was so well known to the House that upon a Question for Reading of it, it Passed by a great Majority in the Negative; so that there was no Division upon that matter, but the Letter was writ in the Words following.

S I R,

I Presume that no Person whatever, in the Interest of the Present Government, hath been more Actually Engaged with Sir John Fenwick than my Self, it being my Fortune several times to bring Letters to him from the Late King and Queen at S. Germans, and to carry his Answers; I have also been with him at the Private Consults of the Late King's Adherents, as my Informations Assert; so that if I may be Serviceable to the detecting his Treasons, I shall be very ready to serve the Government, and to demonstrate my Integrity.

I am, Sir,

Your Honours most Humble
and Devoted Servant,

W. Fuller.

Sir John Fenwick was brought to the House, (by Order) from the Prison of Newgate; and there being a very great Company of Strangers, both in the Lobby and Speaker's Chambers; and the House being full of Members, to prevent the Inconvenience that such a number of People crowding in might occasion, the Lobby was Ordered to be cleared of all Persons that were not concerned, and also the Speaker's Chambers; and that the Back-Door of the same should be lock'd, and the Key laid upon the Table: But it being understood, That the Lords had favoured the Members of the House of Commons upon other occasions with respect to their Lordships Debates; there was private Intimation given to the Serjeant to let them remain in the Speaker's Chambers, when others were removed.

Then .

Then Sir *John Fenwick* was ordered to be brought to the Bar: But it being a Proceeding of that Nature, that none of the Ancientest Members could readily give a Precedent of, It was necessary to settle some Preliminaries; and the first Question that was moved, was, Whether the Mace ought to lye upon the Table when Sir *John Fenwick* was in the House, or whether the Sergeant ought not to stand by him with it at the Bar?

Mr. Smith. Sir *John Fenwick* being a Prisoner, the Mace ought to be at the Bar, and then no Member can speak.

Mr. Boyle. This Hearing of any thing I can think of, is most like the Hearing of an Election, and then the Mace is upon the Table, and every one has liberty to speak and ask Questions.

Mr. Chan. of Excheq. The Mace ought not to be upon the Table, because he is a Prisoner: The Sheriffs of *London* can't have him in Custody here, and so they deliver him into Custody of the Sergeant.

Mr. John Howe. That Argument would be good, if he could not be in Custody of the Serjeant unless he had the Mace in his Hand.

Mr. Brotherton. The Mace ought to be upon the Table, because the Bill is to be Read.

Sir Chr. Musgrave. The Mace ought to be upon the Table. Never any Bill was Read but the Mace was upon the Table.

Col. Granville. If the Mace be not upon the Table, it would be a great Hardship to the Members that they cannot speak, and a great Hardship upon the Prisoner that he cannot ask any Questions. My Lord *Torrington* was brought Prisoner from the *Tower*, and upon Account of his Quality the House did not let him go to the Bar: But while he was in the House the Mace was upon the Table, and he gave an Account of the whole Campaign, and every Body was at Liberty to ask what Questions they pleased.

Mr. Attor. Gen. The Matter is very New; and I think 'tis necessary you resolve upon the Method before you

you call in the Council, that you may acquaint the Counsel with it: I think it not proper that the Mace should be upon the Table, because he is a Prisoner, though it may not be necessary that the Sergeant should have it upon his shoulders all the time, but he may ease himself. I believe you will ask Sir *John Fenwick* what he has to say, but no Questions to make him accuse himself: And I humbly propose it to you, That after the Council is called in, they may open the Nature of the Evidence against Sir *John Fenwick*; and then you will consider, whether you will permit them to go on, or they shall withdraw, and the House will consider what Questions shall be asked.

Col. Mordant. I hope the Questions will be taken down upon a Paper by *the Speaker*, and then read to us, that we may see if they be right, and so asked by *the Speaker*.

Sir Will. Williams. If the Mace is not upon the Table, our Mouths are Muffled; we are in the Nature of Judges, and shall we pass a Vote that the Judges shall not ask any Questions?

Sir Tho. Dyke. I can't be informed without asking of Questions: I know not whether you are a House without it, without having the Mace upon the Table. And will you Act in your highest Capacity without being a House? I do not know how it was when the Lord *Torrington* was here, but when the Duke of *Leeds* was here, the Mace was upon the Table.

Mr. Boyle. I wish you had appointed a Committee to have settled the Preliminaries, and that the Bill had not been brought in at all; what is Laboured as a Matter to avoid delay may occasion more. For though when you carry the Mace from the Table, no Member hath the Liberty to speak, yet any Member hath Liberty to desire that the Council may withdraw, and then they must withdraw, and the Mace must be brought upon the Table.

Mr. Chanc. of Excheq. That Gentleman is certainly in the right: But I think the Mace must not be upon

on the Table when the Prisoner is here; and I think the Questions must be asked by the Chair.

The longest Examination that I remember was that of the *Admiralty*, and then the Questions were asked by the Chair. For the Instance of my Lord *Torrington*, 'tis true he had not the Mace with him, but he came at his own Request, he came to give you an Account of his Proceedings, and in that Case not a Question was asked by any Member; any Member hath Liberty to propose any Question, but it must be asked by the Chair.

Afterwards the Question was put, and it Passed, That Sir *John Fenwick* should stand with the Mace at the Bar.

Then a Question arose about Reading of the Bill; Some Gentlemen said it could not be Read when the Counsel was present, (and they seemed to be under a Difficulty by having passed the last Question;) others said, It was not necessary to Read it while Sir *John Fenwick* was present, he having had a Copy of it; but at last it was thought reasonable, it being in the Nature of a Charge upon him, that it should be Read to him when present with his Counsel; and 'twas said, it was done in the Case of Indictments, though Copies were delivered to the Prisoners: But it should be Read only as a Matter of Form, as a Charge to which he was to Answer; but it could not be reckoned a Second Reading, according to the Rules of the House, the Mace being off the Table, and therefore it should be Read again when the Counsel and he were withdrawn.

And it was said, That the Journals did take Notice that in some Cases, as in the Case of an adjourned Debate, some Bills had been read Four times, and it was agreed, that the Bill should be read to him in the Presence of his Counsel, and so that Difficulty was solved.

And the Sergeant took the Mace, and brought Sir *John Fenwick* to the Bar; and Counsel was admitted for him, and for the Bill, *Viz.* For the Bill

Mr,

Mr. Sergeant Gould, *King's Sergeant*, and Mr. Sergeant Lovel likewise *King's Sergeant*, and Recorder of London.

And Sir Thomas Powys, and Sir Bartholomew Shower, for Sir John Fenwick.

And Mr. Speaker opened the Matter thus.

Mr. Speak. Sir John Fenwick, the House have received Information that you have been in a horrid Conspiracy against the Life of his Majesty, and for bringing in a *French Force* to invade this Kingdom; that you have been Indicted thereof; and they have considered the Nature of the Crime with which you stand Charged, and how destructive it would have been (if it had succeeded) to the very Being of this Kingdom; and therefore that you may not go unpunished, if you are guilty, have ordered a Bill to be brought into this House to Attaint you for High Treason, which hath been once read, and will be now read to you at the Bar; and then you will hear the Evidence against you, and have Liberty to make your Defence: And though you cannot claim any Right thereto, this House (to shew how ready they are to Favour you, in giving you any reasonable help to make your Defence) do allow you Counsel to assist you therein; and having granted you this their Favour, they do expect that you will make a good use of it. I am likewise to acquaint those that are your Counsel, That this House do reckon their own Prudence will so guide them as not to give any just Offence to this House; and that they will not be allowed to question the Power of Parliaments to pass Bills of Attainder when they judge it requisite, of which this House are more proper Judges than any private Person, and therefore they will not allow you to debate that Point.

Let the Bill be Read.

Whereas, Sir John Fenwick, *Bar.* Clerk of the
was upon the Oaths of George Por- House of Com-
ter, Esq; and Cardel Goodman, Gent. at mons reads.
the Sessions of Oyer and Terminer held for the City of Lon-
don,

don, on the 28th. day of May, 1696. Indicted of High-Treason, in Compassing and Imagining the Death and Destruction of His Majesty, and adbering to His Majesty's Enemies, by Consulting and Agreeing with several Persons (whereof some have been already Attainted, and others not yet brought to their Tryal for the said Treasons) at several Meetings to send Robert Charnock, since Attainted and Executed for High-Treason in Conspiring to Assassinate His Majesty's Sacred Person, (whom God long Preserve) to the Late King James in France, to Incite and Incourage the French King to Invade this Kingdom with an Armed Force, by Promising to join with and Assist him with Men and Arms upon such Invasion. And whereas, the said Sir John Fenwick did obtain His Majesty's Favour to have his Tryal delayed from time to time, upon his repeated Promises of making an Ingenious and full Confession of his Knowledge of any Design or Conspiracy against His Majesty's Person or Government, and of the Persons therein concerned: And whereas, he has so far abused His Majesties great Clemency and Indulgence therein, That instead of making such Confession he hath contrived and framed False and Scandalous Papers as his Informations, reflecting on the Fidelity of several Noble Peers, divers Members of the House of Commons, and others, only by Hearsay; and Contriving thereby to Undermine the Government, and create Jealousies between the King and his Subjects; and to stifle the real Conspiracy. And whereas, Cardel Goodman, one of the Witnesses against the said Sir John Fenwick, to Prove the said Treason, lately and since the several times appointed for the Tryal of the said Sir John Fenwick at one of which times the said Sir John Fenwick had been accordingly Tried, had it not been for the Expectation of the said Discoveries so often promised by him is withdrawn; so that the said Cardel Goodman cannot be had, to give Evidence upon any Tryal. Be it Enacted by the King's most Excellent Majesty by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament Assembled, and by the Authority of the same, That the said Sir John Fenwick be, and is hereby Convicted and Attainted of High-Treason, and

and shall suffer the Pains of Death, and incur all Forfeitures as a Person Attainted of High-Treason.

Mr. Speaker. Mr. Sergeant Gould, the House expects from you, and Mr. Sergeant Lovel, that you open the Evidence you have to prove the Suggestions of the Bill.

Mr. Sergeant Gould. Mr. Speaker, we are here in Obedience to your Commands to give an Account of the Charge, and likewise of the Evidence of Fact, that is against this Gentleman, Sir John Fenwick. The Charge against Sir John Fenwick is for High-Treason, and High-Treason of the highest Degree; 'tis no less than a Design of Deposing the King, and subverting the Government, and subjecting it to a French Arbitrary and Slavish Power. It further Charges, That in Prosecution of this Conspiracy he hath met together, with several others, who Consulted, Consented, and Agreed together, to bring in a French Army upon us; and in order to that, as a particular Overt-Act, it is Charged, That they contrived to send one to the Late King James, to bring a French Power upon us. It is Charged likewise, That he Conspired to Levy War upon us, and for that purpose did provide Pistols, and other Warlike Arms. This I take to be the Substance of the Charge against Sir John Fenwick.

Now, may it please you, Mr. Speaker, as for the Evidence of the Fact Charged and alledged against this Gentleman; It is no Secret certainly to any at this time of day (after so many Tryals, so many Convictions, so many Attainders) that for some years last past there hath been a Wicked Conspiracy to bring in a French Power upon us, to subvert this good Government, and to Depose the King; but God Almighty, by special Providence, hath always prevented and disappointed them. We know ever since the Business of La Hogue (in which even by a Miracle God disappointed them) they have been still restless, and have been industrious to set up again this Design; and have not had

had any regard to the King's Mercy shewed to them in Passing severall Acts of General Pardon, but have still persisted in the same Designs.

As to the Charge upon this Gentleman at the Bar we shall shew you that in Time, in the Year 1694. for severall Months there was a Conspiracy carried on but did not take Effect; afterwards, I think the beginning of *June*, or latter end of *May*, there were severall Consults, or Meetings, at the King's Head Tavern at the upper end of *Leadenhall-Street*, where this Gentleman that now stands Charged at the Bar was present; there were severall Gentlemen, and among the rest (as it hath and will appear upon Evidence) there was *Sir John Fenwick*, my Lord *Montgomery*, Captain *Porter*, and *Goodman*: It was then proposed, That one *Charnock* (since Executed, and agreed by all to be present) should go over into *France* to the Late King *James*, to Communicate to him their Resolution and Sincerity in being serviceable to him in Levying War here to depose the King, and subvert the Government; who was to intercede with the *French King*, so that there might be Forces sent from *France*. But after this, *Charnock* (present still this Gentleman) comes and proposes this Thing again, to try whether they were Sincere and Real in their former Resolutions: To which they all did then again agree and declare their Assent, That it should be done, and they were very Zealous in the Matter, and the Forces were at that Time proposed. And what was that? Why truly, no less than 8000 Foot, and 2000 Dragoons of *France*, with an Assurance of 2000 Horse from this Country. *Charnock* did go into *France*, and did Communicate this Matter; and after he had Communicated it he came back, and brought Answer, That King *James* had endeavoured to answer their Expectations, but at that time the *French King* could not spare his Forces, but however returned his Thanks to them.

This passed on till *Christmas* last. Then comes over *Sir George Barclaye* upon this Expedition, and there was
a Com-

a Commission prepared for that purpose; and as to one part he brought along with him a Detachment of some of King *James's* Guards, who were to Assassinate the King. The next part was for raising a Rebellion; now that fell to Sir *John Fenwick's* part. As to the Assassinating part, you have had several Examples made already. This we have Evidence to prove, and if we prove this Matter as we have opened it, then I think there is no Person whatsoever, but will agree that this is High-Treason in the highest Degree. Now, Sir, here stands our Matter; here was an Indictment found according to the Law you made last Sessions of Parliament, by two Witnesses, to one Species of Treason against Sir *John Fenwick*; (we have one of these Witnesses here, *vi-va voce*;) but Sir *John Fenwick* hath Protracted his Tryal by frequent assurances of making a Discovery, which hath determined in what you have already mentioned in your Bill, That Sir *John Fenwick* hath not been Try'd; whereas, he had been Try'd in Course, without these Applications, and found Guilty: But now he hath had all this time, at last, *Goodman* is withdrawn, and we think (but that we must leave to the Judgment of this Honourable House) it may be reasonably supposed, by Contrivance to take off the Prosecution of Sir *John Fenwick*. For why? The Inference is from a Fact that we shall prove to this Honourable House: There hath been the like Attempt upon Captain *Porter*, but Captain *Porter* hath been more stedfast, he hath been so resolved, that he stood his ground; and to speak the Truth, notwithstanding he hath been highly Tempted; for we shall prove to you, that one *Clancy* came to Captain *Porter*, and Tempted him to withdraw into *France*, with assurance of a Pardon, and he had Three Hundred Pounds paid him in hand, and Three Hundred more he was to be paid when he should come into *France*, to be remitted by Bills of Exchange; besides he was to have 300*l.* a Year;

100 l. from my Lord *Alisbury*, 100 l. from my Lord *Montgomery*, and the other 100 l. a Year from Sir *John Fenwick*, and this was to be an Annuity during his Life. And thus far we suspect Sir *John Fenwick* may be concerned; for his Lady came (he did not come Personally, but his Lady did) and gave her Honour and Assurance, that it should be all performed, and much more, if he would withdraw himself.

Captain *Porter* presently made a Discovery of this, but accepted the 300 l. which was paid down; upon this it hath been so far proceeded, that *Clancy* hath been Indicted for it, and convicted, and hath received Judgment, and I suppose there hath been Execution. We have the Record of all these Proceedings.

We have this Circumstance farther in the Case (which it is my Duty to open to this House) to shew what labour there hath been to stifle the truth of the Fact. Upon taking of Sir *John Fenwick*, there was one *Webber* taken with him, and he slid a Letter into one *Fowl's* Hand, and this was to be sent to my Lady *Fenwick*; And what is the Import of this Letter? The Import of it is (They could not prevail with *Porter*, as I opened just now, therefore) you must influence the Jury, get two or three stout Jury Men to starve the rest, for we have nothing else to depend upon: These things we shall humbly offer to prove according to our Duty, and according to the Order of this House, and then leave Sir *John Fenwick* to make his Defence.

Mr. Record. Sir, In what I shall say, I shall endeavour, as I ought, to pursue the Method of this Bill; and first, I will take notice, That it is the Pleasure and Direction of this House, That we should attend this House this Day, to produce the Evidence against Sir *John Fenwick*.

The Crime for which he stands Indicted is High Treason; I presume the learned Gentlemen on the other side will not deny, but that the Compassing and
Conspiring

Conspiring the Death and Destruction of the King is High Treason; and that to endeavour it, or shew it by an Overt-Act, to cause a Foreign Power to Invade the Realm, or to hold Correspondence, or Adhere to the King's Enemies, is likewise High Treason; and therefore I shall not trouble the House to say any thing to that, one way or another, because I believe they will not deny it.

In the next place the Bill does take notice, That Sir *John Fenwick* hath been Indicted at the *Old Bailey* in *May*, 1696. Sir, by a Law of this Parliament made last Sessions, no Man ought to be Indicted of High Treason without two Witnesses. Pursuant to that Law, Sir *John Fenwick* hath been Indicted upon the Oaths of two Witnesses, Captain *Porter* (whom we have here) and *Goodman* (whom we then had) who did Swear to the same Treason; and upon the Evidence of these two Witnesses the Jury found the Bill.

We have this further Matter. Before the Time the Bill was presented to the Grand-Jury, there was an Examination taken both of *Porter* and *Goodman* in Writing, and I think it was before a Worthy Member of this House, to whom I Appeal in this Case, and in those Examinations (if I mistake not) the same Informations they gave against Sir *John Fenwick*, as they gave against Mr. *Cook*, and upon the Tryal of *Cook* they were Sworn, and did Justifie and Verifie the Informations they had given before. And if you please, we shall call Witnesses to prove, That upon the Tryal of *Cook*, *Porter* and *Goodman* gave that Evidence that did equally affect Sir *John Fenwick* (for he was then withdrawn, and could not be taken) and the Evidence was, that *Cook*, Sir *John Fenwick*, with my Lord *Alisbury*, my Lord *Montgomery*, Sir *William Perkins*, Sir *John Friend*, *Charnock*, *Goodman*, and *Porter*, were altogether at a Consult especially appointed for the carrying on these Trayterous Purposes. They gave the Court a great deal of trouble, upon the Point whether *Goodman* was there at that

time, and they did call some Servants of the House who did prevaricate about that matter, but the Court was throughly satisfy'd, and it hath appear'd more plainly since, that they did abuse the Justice of the Court, for that *Goodman* was undoubtedly there. Sir, *Cook* upon the Tryal was Convicted, and had Judgment of Death. And, Sir, he is Attainted, but it does not become me to say, Why he is not Executed? His Majesty, no doubt, hath great reason for it. But this I may say, being present at the Tryal, nothing was made more plain; and Sir *John Fenwick* appear'd to be equally concern'd.

To shew Sir *John Fenwick* is Guilty, I crave leave to add this, he did withdraw himself, and fled, and was enquired after with diligence, and at last he was found.

We shall make good all we have charged him with, by Evidence (we hope) to the satisfaction of this House.

Mr. *Speaker*, if you please, Mr. *Baker*, that is Solicitor for the King in this Case, does attend at the Door with all the Papers. We desire that he may be let in.

Mr. *Speaker*. Sergeant, call in Mr. *Baker*.

Which was done.

Mr. *Speaker*. What do you call Mr. *Baker* for?

Mr. *Serg. Gould*. To give an Account of this Indictment, for we have a true Copy from the Record.

Sir *Thomas Powys*. Mr. *Speaker*, since I am here Assigned Counsel for the Prisoner, By the Allowance of this Honourable House, upon his Application, without my privity, I crave leave humbly to acquaint you on behalf of my Client, That I take it for granted that he is (I am sure we that are Counsel for him) are a little surprized in what the King's Counsel are going about; for in truth we were not aware, nor do we find that any notice was given to the Gentleman at the Bar, that there would be any
Proceeding

Proceeding against him by Examining of Witnesses, or giving of Evidence; he had (it seems) the Vote of the House sent to him, and likewise a Copy of the Bill; but I could not understand that the House had given notice that he should be prepared by Witnesses, if he had any, or be at liberty to produce them. Nor was there the least notice to him, that there would be a Proceeding against him by way of giving Evidence. He did as I find, humbly apply himself by Petition, That he might be heard by Counsel against the passing of the Bill, and I shall very carefully observe those Directions you gave us, which I hope we should not have stood in need of, but have behaved our selves as becomes us, and not have drawn in question the Power of Parliaments: I never had a thought to do such a thing. but this I humbly lay before you for your Consideration, Whether without any sort of notice that I perceive, he hath had from this House to make his Defence to any Evidence, and consequently there could be no need of Witnesses on his behalf (whether you will so proceed unless he had had forewarning to provide himself otherwise than by the Printed Votes, which (I suppose) he had no opportunity of seeing, and whether within the Words you are pleased to acquaint us with, we may be heard, as to the reasonableness of this Proceeding, that by and by we must crave leave to speak unto.

Mr. Speaker. Sir *John Fenwick* did Petition, it is true, That he might be heard by Counsel at the Bar against passing the Bill; but he likewise Petitioned for Counsel and a Solicitor, and the Answer from the House was, That he should be allowed Counsel to make his Defence.

Sir Thomas Powys. Yes, Sir, I have seen the Order of the House; and truly there did not any thing occur from it to me, That it should be expected that he should produce Witnesses. for he praying that he might be heard against passing of the Bill, and the

Order of the House being that he might have Counsel for making of his Defence, I did not apprehend that it impowered us so to be prepared as to bring Witnesses, especially there being no notice given to him to bring Witnesses, nor no way for him to compel them to come here.

Sir Barth. Shower. Mr. Speaker, we do acknowledge that we are so far ready as to offer some Considerations against the reasonableness of the Bill. We perceive our selves confined not to Argue against such Bills in general, and therefore shall confine our selves as to this Bill against Sir *John Fenwick* in particular, and the suggestions in the Bill; but as to making his Defence against matter of Fact, and to Answering

Note, This Order was made the Day before at the rising of the House.

the Charge made at the Bar, we are not ready. The first time we had notice that Sir *John Fenwick* should Attend, or be brought to the Bar, was last Night at Nine or Ten a Clock at Night. 'Tis true, the Order said that the King's Counsel should produce Evidence for the Bill upon this Day; but it was not Ordered that there might be Evidence produced for Sir *John Fenwick*, or at that time that he should be Personally present: We are ready, with all submission, to offer what we have to say against the passing of this Bill, upon the Suggestions made in the Bill, as Sir *John Fenwick's* Case is there represented; but to answer them in respect of Truth or Falsehood, that we are not prepared to do; whether you will hear them to that before you have heard us, in the other particular, that we submit to you.

Mr. Speaker. Sir, you had Notice on *Wednesday* last, that Sir *John Fenwick* should have liberty to make his Defence by Counsel; and if you had doubted whether he should be admitted to do it by Witnesses, you might have applied to have known the Pleasure of the House; But if that be what you stand upon, if you will withdraw, you shall know the Pleasure of the House.

Mr.

Mr. Sergeant Gould. I must confess we depended on it, and expected no other Thing than that the Prisoner at the Bar should produce his Evidence. This was our Order, and I apprehended that the Petition meant the same Thing; For, as I remember, it was an Order likewise that the King's Counsel should produce the King's Evidence: What Reason was there for that Evidence, unless Sir *John* was to apply himself to answer it?

Mr. Recorder. I beg your leave to observe with what Reason the Counsel on the other side make this Objection; when 'tis the import of this Bill, that Sir *John Fenwick* is guilty of High Treason: And your Order says, They are to be heard against the Bill, that is to say, They are to be heard against the High Treason charged upon him by this Bill. Therefore the House did direct us to produce the Evidence against Sir *John Fenwick*, to verify the Suggestions of this Bill: And so I cannot apprehend what can be more proper at this time, but to prove the Fact against Sir *John Fenwick*; and 'tis their Business to defend it as well as they can.

Sir Thomas Powys. What was said by the Learned Gentleman on the other side, I hope will be some reason why we might be of Opinion, that we should not have Occasion to produce Witnesses: And the Truth is, This Bill do's no where so much as say, Sir *John Fenwick* is Guilty of High Treason; and therefore *Mr. Recorder* was under some Mistake, when he said the Bill charged that he was Guilty. The Bill does not any where make such an Allegation; there is nothing but a Recital that he was indicted for Treason; and then it recites, That whereas he had protracted his Tryal by such Means as are mentioned, and *Goodman* had withdrawn himself, (but it does not say with his Privity;) and then follows the Enacting part, *Be it Enacted, &c.* So that there is no such Thing as any Allegation that he is guilty, whereby we could imagine that that was

the Fact or Question between us. We now offer these Things humbly to you, and shall readily submit to what you think fit to do in it.

Mr. Recorder. Sir *Thomas Powys* says, That Sir *John Fenwick* is not Charged with his doing any Act, or being Guilty of High-Treason; but the Bill takes Notice that he stands Indicted for it: Then it will be enough for us to prove, that he stands Indicted, unless the House think fit to let us go into the Evidence of his being Guilty.

Sir Bartholomew Shower. We will not oppose the producing Evidence to prove the Suggestions of the Bill, and the Recitals made therein: But if they attempt to prove him actually Guilty by living Witnesses, as they have opened it here at the Bar, that we humbly beg leave to oppose. But if they think fit to prove the Suggestions of the Bill, That there was an Indictment, that there were Witnesses sworn to it, and one is withdrawn, and the Promises of making Confession, and his Prevaricating in that Matter, we are ready to make our Defence to that.

Mr. Speaker. Gentlemen, you must withdraw before you have the Directions of the House.

Accordingly Sir John Fenwick, and the Counsel on both Sides withdrew.

And being withdrawn.

Mr. Speaker. Gentlemen you have heard what is stood upon by the Counsel for Sir *John Fenwick*: They say, if you call only Evidence to prove the Suggestions of the Bill, they are ready to answer them; but if you call any Evidence to prove Sir *John Fenwick* Guilty of this Conspiracy, by living Witnesses, they pretend they are not ready, and say, They did not know they should be allowed Liberty to Produce any Witnesses.

Sir Tho. Littleton. *Mr. Speaker,* the Counsel could not think that the Bill should set forth that Sir *John Fenwick* was Indicted, but that the House would know by what Means; and that *Goodman* was gone away,

away, and we should not Enquire by what Means? What are the Objections by the Counsel against the Bill? Say they, We are ready to give Reasons against the Bill; They do not Speak downright against your Jurisdiction: But say they, we are ready to shew 'tis not reasonable in this Case, as stand Circumstances, to pass this Bill. Sir *John's* Petition was to be heard downright against the Bill, If it was your Intention to hear him to that, and to that only, I Conceive you would not have worded your Answer as you did. You ordered him Counsel to make his Defence, and at the same time ordered the King's Council to produce the Evidence. How could they understand it, but to make defence to the Evidence? It may be they have a mind to have another Fee, whether you will think fit, in the Circumstances you stand, to give them further time I do not know: But the Circumstances of the Kingdom, and King's Life, must be considered, as well as Sir *John Fenwick*. What is the meaning that they are not prepared? I suppose it is to have further time. But I think your Order is so plainly worded that they could not ignorantly mistake it.

Lord *Norreys*. I rise up to the matter of Fact. That Gentleman tells you your Order is plainly worded; 'tis so, if they had timely notice of it: But the Counsel at the Bar tell you, they had no notice of this Order till Ten a Clock last Night.

Mr. *Speaker*. That noble Lord does Mistake; for that which they say they had no Notice of till last Night, was, That Sir *John Fenwick* should be brought hither; but the Notice that he should be heard by his Counsel for his Defence was sent him the Day before.

Lord *Norreys*. This very Order, for his Majesty's Counsel to produce the Evidence, was made but upon Thursday.

Mr. *Speaker*. Then I mistake. But the Order that was made upon his Petition I sent away immediately:

ly: But the Order they mean, I suppose, is that for bringing him hither.

Mr. Cowper. Say the Council for Sir *John Fenwick*, we come prepared to make defence to every thing charged in the Preamble of the Bill, but what is not charged we do not come prepared to make defence to. Now they conceive the Fact of High-Treason is not charged upon him by the Bill; and if true, it was of great weight; but as it is, 'tis none: For first, 'tis plain, the Preamble recites that he was Indicted of High-Treason by the Grand Jury, That is a Charge of High-Treason within the Bill; for it says he was Charged by the Oaths of his Country upon the Oaths of Two Witnesses, and there is the very Overt-Act recited in the Preamble of the Bill. Now allowing this its due Weight, Can any one think that sits here in his private Judgment, That the High-Treason thus recited, as found by the Grand Jury, could be apprehended by Sir *John Fenwick* or his Council as no part of his Charge? The very Nature of the Bill speaks it; for could any one think, that you would Ground a Bill of Attainder upon a Suggestion, that he being Indicted of High-Treason had spirited away one of the King's Evidence, or for giving false Information to the Government. So that this is trifling with the House, with Submission.

Sir Richard Temple. Can any Body say any thing of the Intention of the House, when 'tis reduced into a Bill? Is it not the Bill that he is to make his Defence to? And the Gentleman that spake last, says, That no Body could think otherwise? Why Sir, no Body is to think otherwise than the Bill states it.

Now the thing before you is, Whether upon the Suggestions of this Bill 'tis fit for you to Pass it? The Case of *Mortimer* was, That he had made his Escape, being under an Indictment of High-Treason, and it came before the House, Whether upon the Statute of 25 E. 3. it was High-Treason: But they did not debate the Fact.

Now

Now you have brought a Bill here, and all the Ground is, That he was Indicted for High-Treason, had thus and thus Prevaricated and Delay'd his Tryal, upon Promises of Confession, and in conclusion one of the Witnesses is withdrawn: Sir, no Man is to make his Defence but to what is in the Bill; nor can you Examine to any thing but what is suggested in the Bill. If you will put the Issue upon the Guilt of Sir *John Fenwick*, he must have a fair Tryal in some Place, and that he can't have here upon Oath; for upon all Bills of Attainders they have had a fair Tryal above.

Mr. *Smith*. I always thought when a Bill of Attainder was to pass through this House, That every Man was Concerned to hear what Evidence he could, to make it appear whether the Person was Guilty of the Facts that were alledged against him to condemn him for; and, I take it, the Principal Thing to be considered is, Whether he be guilty of such a Crime as deserves such a Punishment. So that, I take it, the Question now is, Whether Sir *John Fenwick* hath had that notice to produce his Evidence as is convenient? For I think we should lose time to let Counsel ramble upon the Reasonableness of our Proceedings; the Question is, Whether he is Guilty of the Fact? Sir, I can never think the Counsel could understand your Order, when it says to make his Defence; but it must be to the Fact upon which he is to be condemned. You have already determined the Point, as to his Prevaricating, but that is not the Matter that shall make me find him Guilty: But the Evidence that will weigh with me is the Evidence of High-Treason, and how far they can answer it.

Mr. *Hooper*. The Question is, Whether or no there be a sufficient Guilt laid to this Man's Charge? For in all Courts of Judicature this is a certain Rule, You must proceed *Secundum Allegata & Probata*; and you shall not go about to prove a Thing unless it be alledged. Now the Question is, Whether this Thing
be

be alledged in the whole Bill, That Sir *John Fenwick* is guilty of High-Treason? And if not, whether they shall prove what is not alledged? 'Tis true, it hath been alledged that a Bill hath been found; but several have been Indicted who have been Acquitted. It is possible the Prisoner at the Bar may be Guilty; but I think we must observe that Method here, that is observed every where else, and that is not to go about to prove any thing that is not alledged.

Mr. *Clarke*. The Learned Gentleman hath made an Objection that perhaps would hold very well in *Westminster Hall*: But I suppose he may remember this Bill must have a second Reading before you, as a House; and there may be Allegations different from what they are now. But the principal Matter before you is, Whether this Gentleman be Guilty of High-Treason or no? And if they did not prepare to that part, I think they were negligent to their Client; for it appears to be that part that is like most sensibly to affect him.

Mr. *Hewe*. The more I hear the Matter debated, the more it seems strange to me. I have heard the Bill read, and took notice of the Heads of it: I always understood the Preamble of the Bill to be the Inducement to the End of it; I was mightily surprized to hear the King's Counsel took no notice of any part of it, I think they did not speak materially to one Point of the Allegations in the Bill, so that the Allegations do signify nothing: If they intend the Allegations should signify any thing, they ought sure to be fully proved before we pass our Judgments upon the Bill. The Counsel, instead of endeavouring to prove him Guilty of High-Treason, have applied themselves only to prove that he was Indicted for High-Treason, and have been so far from proving that he hath prevaricated, that they say not one Word of it. Instead of Proving that he has forged Papers, in order to alienate the Minds of the King's Subjects, they say nothing of that neither, tho' in the Bill these are recited

as Motives, for passing of it. Whatever is laid down in the Bill, as a charge against him, ought to be proved, or how can we Answer passing the Bill. No proceeding can be justifiable, if the Fact upon which it is grounded, is any way suspicious or doubtful: so that I hope the King's Council will go on, to prove the Allegations of the Bill, or the House to deny both them and it.

I shall no more give my Vote to Hang him, because he is Indicted of High-Treason, than I shall because he hath been in *Newgate*.

Mr. Sloane. I think a great deal of your time in debating this Matter may be saved; though I will allow the Bill might have been drawn better, and that a bare Indictment is not a sufficient Ground of it self for a final Decision of this Matter: But when at the time of the finding the Indictment there was two Witnesses, and one of them is withdrawn, and is supposed by his means; if the Bill seems imperfect, for any thing before you now, you will not stay all the Proceedings upon it; but if you see it imperfect, and it may be amended, you will amend it at the Committee. I think the Favour you have given is abused, and that 'tis perfect trifling from the Bar. In one Breath they say, They could not get ready, for they had no Notice till last Night; and in the next place they say, They will go on to every thing but his being Guilty; and I believe they never will be prepared for that.

Mr. Attorney General. Sir, I am very unwilling to speak any thing in this Matter; because, Sir, by the Place I have the Honour to serve his Majesty in, as one of his Counsel, if it was in the Courts below, I must prosecute on behalf of the King: But I am very sensible while I am in this House, I am in another Capacity; I am to Vote here as a Judge, and not as a Party.

That which I do now trouble you about, is in relation to the Matter that hath been Objected; That the

the Bill does not expressly affirm, that Sir *John Fenwick* was Guilty of High-Treason, but only that he was Indicted for it: Truly I thought, and do still, with humble Submission to the House, That that Matter of Affirming him to be Guilty of High-Treason was not to be inserted in the Bill; for that will be the Consequence of your Judgment, and Opinion, upon hearing of the Evidence. The worthy Member that spake last said, the Bill might be better drawn; I am sorry we had not his Assistance in it: But with Submission to his Understanding I think that had been too much Presumption, till you were satisfied whether he was Guilty or no. We could only go so far as to set forth the Facts we knew; as that he was Indicted that we can verifie, and can't take this to be like the Case of an Indictment: for there you must affirm such and such Things that cannot be altered afterwards: But a Bill in Parliament hath many Steps, you read it several times, and commit it; so that you alter the Suggestions of the Bill as the Case appears to you to be verified; and if you be of Opinion that he is not Guilty, you will not condemn him because he is Indicted: However that is not immaterial but proper to be set forth for a Ground of your Proceedings, That there was a Probability of his being Guilty from that Accusation. Therefore, Sir, I confess, I can't think that those Gentlemen that are Council for Sir *John Fenwick* could think, that you did intend to proceed otherwise than to hear Council as to the Fact. They could not think that the proof of his being Indicted, would be Ground enough for you to proceed to pass the Bill: For how could any body think, but you would come to examine the Fact? I can't see how they should come to Mistake unless 'twas wilfully.

Mr. Price. The Matter now Debated, is, What Method shall be followed, or what Evidence shall be given upon this Bill, or whether Evidence shall be given of any other Matter than is suggested in the Bill:

Bill : I must confess, making a false step at first setting out, hath put us out of the way hitherto: For in the Case of my Lord *Strafford* Witnesses were Examined, and he was Adjudged to be Guilty, before there was any Order for a Bill of Attainder. But since you are in this way, pray consider whether the Council against the Bill have gone according to your Order. The Order was, That Council should be heard to prove the Suggestions of the Bill, and the Council for Sir *John Fenwick* do not oppose that, but the Council for the Bill open more things than are comprehended in the Suggestions of the Bill, for the Suggestions are only a Recital, and are no positive averment. And though a Bill and an Indictment do very much differ, yet they must agree in this, to put a Charge upon the Person. If the Preamble is not to any purpose, What need they have made any? They might have said only, *Let him be Attainted.* To what purpose does Sir *John Fenwick* come to the Bar? if it is to any purpose, 'tis to Answer the Charge of the Bill. That learned Person says, the Bill ought not to Suggest that he is Guilty till the Matter is proved, then there must be an Amendment in that point, and that will make it a new Bill, and then he must have another Day to Answer that new Charge. But they might as well have said he was Guilty of High-Treason, as to say in the Enacting part, *that he should be Attainted.* Therefore if the Gentlemen for the Bill will proceed and prove the Preamble of the Bill, let them. Otherwise I desire there may be another Day for Sir *John Fenwick* to Attend, and let them do all together.

Sir *Christopher Musgrave.* I think as to that learned Person nothing is to be laid to his Charge, for I think they have drawn the Bill pursuant to the Directions. And if they had drawn it otherwise, before they had known the Sense of the House, I think they had been Guilty of a Crime.

That

That which seems to be before you, is what was opened by the King's Counsel, and that was to prove the Treason. Now, Sir, I would be glad to know of any Person, Whether any thing is to be admitted to be proved at your Bar but what is in your Bill? For let us have a little regard to the Proceedings in *Westminster-Hall*. Can any Person upon any Indictment of High-Treason, offer Evidence of any Treason but what is express'd in the Indictment? And I think this is the same in effect; for here you draw a Bill of Attainder against Sir *John Fenwick*, and in Justice you send him a Copy of it, and with great Favour too, you allow him Counsel to Defend himself. To what? as to the Suggestions that are in the Bill. Otherwise to what end did you send him the Copy of the Bill? Now if you will admit of any thing to be proved but what is in your Bill, I know not of what dangerous Consequence it may be, for 'tis impossible to be prepared for it.

Mr. *Sollicitor General*. If the Counsel against the Bill could be any way mistaken, or think the Bill defective, I am for giving them longer time to make their best Defence, but I think neither one nor the other of them true. But your Order was to draw a Bill for Attainting Sir *John Fenwick* of High Treason, and I think if the Bill had gone no farther, but Enacted *that he should be Attainted of High-Treason*, we had strictly pursued your Order, for the Preamble is no necessary part of the Bill.

A Bill and an Indictment are of quite different Natures; there is a Form for an Indictment, but none Prescribed for an Act of Parliament.

As to the Preamble, the Debate when it was Ordered went no farther than that he was Accused of High-Treason, and was like to have been brought to his Tryal, and to delay it he pretended to make an ingenuous Confession; and instead of that, there was produced a Paper which you have censured (as you thought fit) and upon that you voted a Bill to be brought

brought in to Attaint him of High Treason ; what then could be expected more for the Inducement, but the Debate upon which it was Ordered.

If the House had thought fit to Examine Witnesses before, (as now) no doubt but the Bill should have Suggested that he was Guilty of High-Treason ; but 'tis time enough for you to Suggest that, after you have heard what the Witnesses shall say. If the Counsel did not know this, notwithstanding all that I have said, I am for giving them time, but (with Submission) it was impossible for them to mistake it. If the Bill had went no farther than, Be it Enacted *that he should be Attainted of High Treason*, then they had some colour to say there were different Species of High Treason, and they could not tell to what particular Facts they should apply themselves. But when the *Indictment* is Recited, which charges him with particular Facts, and tells him by what Witnesses the Bill was found, it was impossible for the Counsel not to know that the Treason in the Indictment was the High Treason you did intend to Enact that he should be Attainted for, but when they say they are not ready, truly there may be some reason for it, for I believe they never will be ready. Sometimes Men will be wilfully mistaken, and sometimes 'tis their misfortune to be so. They say they are mistaken, which of these are true I know not. But we have seen already the time when he hath trifled with the Courts of Justice, he hath delay'd his Tryal till one Witness is withdrawn ; if you give him longer time, he may have the good fortune to have the other gone too ; I see no reason for you to forbear hearing of the Evidence,

Mr. James Montague. I am not surpriz'd to hear Sir John Ferrwick desire time, for giving him time is giving him life ; nor for his Counsel to tell you his Witnesses are not ready ; 'tis a common excuse. I hardly ever knew a Person brought upon his Tryal, but that was his Excuse ; and yet I have seldom
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known it allow'd as a good excuse : But 'tis objected, you must go *secundum allegata & probata*, and nothing being in this Bill like what the Counsel for the Bill did open, 'tis not fit to hear Witnesses to what is not alledged in the Bill. I grant that; and yet I think the Counsel ought to be allowed to call Witnesses to prove every thing they have opened to you: 'Tis agreed they ought not to have brought in a Bill to say in point blank terms, he is Guilty of High Treason; but then say they, you should have Charged in the Bill what Treason he is Accused of, and then they should have been admitted to prove it. With Submission, the Bill does that thing; for the Bill does Recite, *that he is Indicted of High Treason in Compassing, &c.* 'Tis plain then the very Treason that is Charged upon him by the Indictment is specified in this very Bill: And sure you will permit them to prove what is alledged in the Bill. Now, What did the Counsel for the Bill open? That at several Meetings they met to consult of the Matter, that this Bill takes notice of: Did not the Counsel tell you when *Charnock* went there for that purpose, and when *Charnock* met them again for their further Assurance? Now this being so plainly set forth in the Bill here, which Recites that this Matter was proved by two Witnesses, upon the Credit of whose Testimony his Indictment was found, and that one of them is gone away; and all they say now is we are ready to prove the matter then Sworn: is not that proper to satisfy Gentlemens Consciences that won't Convict this Man without Evidence?

Sir *Francis Winnington*. Mr Speaker, I humbly conceive the Question is not now, Whether Sir *John Fenwick* is Guilty or not, But, Whether the Objections the Counsel for him have made, be so strong as you will grant what they move to you; They tell you if Counsel will proceed upon nothing but what is Suggested in the Bill, according to your Order, they are ready to make their Defence. It was said the King's
Counsel

Council was Ordered to give their Evidence, that can have no Interpretation but as to the Matters in the Bill.

Say the King's Council, We will prove him Guilty; say the Council on the other side, I hope the House will give us time to Encounter them in that, for you have no such thing in the Bill. The sending them the Copy of the Bill was as much as to say, you need not prove any thing but what is therein asserted. 'Twas said by the learned Gentleman there, that there might have been an Act of Parliament which might have said only, *Be it Enacted*, That such a Man be Attainted, without giving any Reason. I cannot deny but it might be so without any Reason, but I don't believe it will be so. And another learned Person was for mending of the Bill; says he, when you have the Matter of Fact proved before you, it may lead you to the amending of the Bill, and Inserting what you please, and Enacting of it: but does that Answer what the Council said on the other side? Would you have us Answer what we did not know that you would stand upon? The Question is not, Whether he be Guilty or no? But whether the Objections that are made be good to give them time?

Col. *Granvill*. Sir, the Counsel (by what I observed from them) have started two Difficulties; and really (to me) both seem very material; the first is, Whether the King's Counsel shall be at liberty to prove any thing that is not suggested in the Bill: The other is, whether Sir *John Fenwick* had due notice to make his Defence.

The first is a Matter of very great Moment. You are proceeding upon a Bill where not only the Life of Sir *John Fenwick*, but the Life of every Man in *England* is in some measure concerned. When a Precedent is made in this Case, no body knows who may be affected or hurt by it, and therefore I desire you will settle that Matter, and have the Judgment of the House, whether they will admit the Council to prove

any thing that is not suggested in the Bill ; if you will, I do not see how any Man that stands at the Bar of your House, can be prepared to make his Defence. For there shall be one Crime alledged in the Bill, and when he comes to the Bar, the Council that are to Prosecute, shall go quite off from that which is laid in the Bill, and produce you Evidence to a new Crime. Sir, you had as good allow him no Council, or Copy of the Bill which you thought so necessary for every Man that was to come upon his Tryal for his Life for Treason, That you altered that Tryal, and declared no Man should have any Treason proved against him that is not alledged against him in the Indictment.

We have had great Complaints of *Westminster Hall* upon this Subject, and if the Parliament should proceed in this manner, may have the same again. If we are too rash in our proceedings, they will be countenanced mightily in them, if you should proceed against a Man, and Condemn him for one thing when he is Accused of another ; I desire to know, how we can Proceed on a Bill upon which Sir *John Fenwick* is to be proved Guilty, and he hath no opportunity to Answer to it ; I take it, as this Bill is drawn, Sir *John Fenwick's* Guilt is no way concern'd in it : for whereas the worthy Gentleman tells you the Treason is specify'd, there is no Treason specify'd otherwise than that he is Indicted for it.

Mr. *George Rodney Bridges*. Sir, I think the proper Question before you is, Whether you will allow Sir *John Fenwick* time to produce such Witnesses as he shall desire for his Justification ? 'Tis a little strange to me, that the Gentlemen that are of Sir *John Fenwick's* Council, should insist upon farther time for his Preparation, when (I think) 'tis very plain, they were told what they were to prepare for by the Bill, which was, They were to justify Sir *John Fenwick* against those things he stands Indicted for ; and the Matter of the Indictment is the thing to be proved before you

you and the Witnesses to make it good, are likewise mentioned; one of them is gone, but his Testimony remains upon Oath, not only to the Grand-Jury, but in another place, I do not think you will think it reasonable, after the King's Council have made out their Evidence, to give Sir *John Fenwick* time to make observations upon the Charge; so you will consider before you hear the King's Counsel, whether you will allow him farther time, or no.

Sir Jos. Williamson. Mr. Speaker, The Gentleman that spoke last, states the Case to be, Whether you will think it reasonable to allow Sir *John Fenwick* farther time to produce his Witnesses? You may, Sir, make that the Question; but that will depend upon another, which is, Whether you think that Sir *John Fenwick* had not notice enough to prepare to defend himself against the Charge contained in the Preamble of the Bill? And I add this further, Whether the Manner and Way of expressing that particular Charge in the Bill, is not so Worded, so Charged, as here expressly to become a Charge that he is to Answer; and not only as a Matter of Fact Historically related, but to come in proof here: For if it proves to be well Charged in the Preamble, 'tis a particular Fact of Treason he is to Answer for in this House, and then he hath had time enough; so that now you are to judge of your own way of expressing your selves. I believe every Gentleman knows it was the Sense and Meaning of the House, That those are the particular Treasons mentioned in the Indictment with which he should be Charged at the Bar, and have time and liberty to Defend himself; and not only to the Allegations that he had been Indicted, &c. Now, Sir, if you shall allow these Gentlemen to except against your way of expressing your selves, that I submit to you. But 'tis clear to me, that this was a very good and proper way of expressing your selves, to Charge him with these Facts, and to give him Liberty to disprove it. If he and his Council understood it other-

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wise,

wife, the Question is, Whether their differing with you in the way of Expressing it shall be allowed to them, without taking a reasonable Exception to it? You are tyed here to the strict Rules of Justice, but as to the Forms of Proceeding below, I don't think you are. Our Meaning was most certain (though he was Indicted, that was nothing to us) That they should bring their Proof to our Bar to prove him Guilty; and if you should give him two or three Days time, 'tis to mend your Bill to their way of Expression, and to their Sense.

Mr. *Brotherton*. I take the Question to be now, Whether the King's Counsel should give Evidence of any other Matter than what is alledged in the Bill? As to that I must observe to you, That this Bill does not set forth any particular Charge against him; it does not say, That he such a Day did such a Fact, whereby he can make his Defence, 'tis only the Recital of an Indictment; and it does not say the particular Time and Place where the Fact was done. Now as to what that Gentleman says, If it had been said Generally, that he should be Attainted it had been sufficient. 22 H. 8. The Statute for Attainting one for putting Poyson into a Pot, &c. there is the Day and Year when the Fact was committed, and so he might make his Defence. Then the King's Counsel offer to prove, That this *Goodman* was conveyed away by Sir *John Fenwick*, and there is no such Charge in the Bill; for the Bill only says, That he is withdrawn; and I am of Opinion they ought to give Evidence of nothing but what is in the Bill.

Mr. *Whittaker*. As to the Exceptions made by the Council to the insufficiency of the Bill, by which they pretend Sir *John Fenwick* was lead into an Error, so that he had no due Notice, I must needs say, If they were in *Westminster* Hall they would be in the Right: But this House is not bound to those Forms; for I believe the Enacting Clause would do the Business of Sir *John Fenwick* well enough, if all the rest were

were laid aside; and yet I will consider it with as much Tenderness and Conscience for the *Prisoner* at the Bar as any that bring Arguments from *Westminster Hall*. I would consider, Whether such a Defence as they have made, that from the Bill (as to what is laid in it) he had not Notice enough to prepare to make his Answer: They say, a Recital is no direct Affirmation. In Civil Matters it is an Affirmation. For to say, *Whereas such a one is Bound*, is good in a Declaration upon a Bond. Now I would know, Whether this be not enough to say, that he is Indicted without an Allegation that he is Guilty? Had the Bill no recital at all, it had been an Objection; but it may be it had been such an Objection, that they ought to have done something of their Parts, as to have desired the Opinion of the House to what they should have answered: For suppose there had been no Recital at all (and you may make what Recital you think fit) what should Sir *John Fenwick* have done? There are some Cases where the Common Law does allow a general Charge; A Man is indicted for being a common *Barretor*, and there are no Instances given in the Indictment; why then he comes and prays the Court, that they may declare what Instances they will go upon and that they may give no other in Evidence: Therefore I question not but that should have come on his part. He is to be heard as to the Enacting part of the Bill. Now if they do offer to give Evidence of any Treason that is not specified in the Recital of the Bill, and the Counsel make an Objection to it, I shall agree with them.

Sir *Ed. Seymour*. Mr. *Speaker*, what hath been said to you by that worthy Person that spoke last, no doubt is true; That if there had been no more than the Enacting Clause, it would have done Sir *John Fenwick's* Business with a Witness, or rather without a Witness: But that is not the Question we are dis-

putting here ; but the Question is, Whether you will give Sir *John Fenwick* longer time to make his Defence to that part he insists on, that is *Past Three a Clock.* not contained in the Bill. We are all satisfied I suppose that we can't go through with the Suggestions to Night, and the Debates, and what relates to it ; and I find no Person against putting it off, but because it would be a delay, and if it be no delay that Reason is out of Doors.

They tell you the Council could not but take Notice of the Matters suggested in the Indictment : I cannot think that is reasonably argued ; because they do know the Practice and Method is such, That they can take Notice of nothing but what is specified and contained in the Bill. And therefore there being no Guilt charged upon Sir *John Fenwick* in the Bill, Is it reasonable they should come and accuse themselves here, or make a Defence to what is not Charged ? No ; but, say they, It is Implied. This is an untrodden Path, and you ought to walk as securely in it as you can. 'Tis Extraordinary that you bring Sir *John Fenwick*, here to Answer for Treason, when 'tis allowed in the Suggestions of the Bill ; you have but one Witness to that Treason, but when you take these extraordinary Steps, you should comply with him as much as you can in the Forms. For if Treason be not Treason unless it be proved by two Witnesses, I hope that you will give him time to make his Defence, and I think it no loss of Time (for you can't go through the Bill to Night) to take another Day to see whether Sir *John Fenwick* be guilty of what is contained in the Indictment. And I will give you one Reason why he could not be prepared to make his Defence in so short a Time, for he had no Order for the Witnesses if he had any ; and if you give him longer time, I suppose you will think fit that Sir *John Fenwick* should give an Account of what Witnesses he shall make use of for his Defence and you will give an Order for those Witnesses.

Mr. Harcourt,

Mr. Harcourt. If Sir *John Fenwick's* Business must be done, I hope we shall do it like rational Men, and whatever we Enact be able to give a reasonable Account of it.

As to the Question proposed, your Debates have ran several ways: The first is, Whether Sir *John Fenwick* shall be allowed further Time? And in this Case, whoever I differ with, 'tis of that Nature that I must desire the Liberty of speaking my mind. I must confess I see no reason for enlarging the Time, and I shall humbly submit my Opinion to other Gentlemen, whether he should have further Time to prepare his Witnesses: And for that, pray consider the Nature of the Matter before you.

Sir, there is nothing certain that is alledged in the Bill; and should you allow him further time, to answer that which is not alledged, I can't imagine what Effect you would have of it. 'Tis said indeed, he stands Indicted; but 'tis no where suggested, that he is Guilty of that Indictment. Such a general Charge has always seem'd a great Hardship: There is no one Thing that so many Persons have been unjustly taken off by, as by the alledging general Facts in Indictments of High-Treason, in such an uncertain manner, that the parties accused know not what they were to Answer to; nor has any thing been complained of in such Tryals for a greater Grievance. What have you done in the Bill for regulating of Tryals in Cases of High-Treason? In that Bill you have reformed that Abuse, and taken care, That whatever Treason a Man might be Guilty of, yet he shall never upon his Indictment, answer to any Fact, unless the particular Overt-Act be expressly laid and affirmed in his Indictment. By the same reason in my opinion,

That which seems most reasonable in this Case to be done is not to enlarge the time; but when you think fitting to proceed, proceed upon what is before you. There are some Matters expressly alledged; let them go over the Recital, see whether they can prove that

that; but I can't imagine to what purpose you should give the Prisoner further time to answer nothing, for that which is not Charged is so.

Mr. *Finch*. Mr. *Speaker*. Sir, this is a Question in my Opinion of very great Consequence: You are very well told from below, That this is an untrodden Path, and I am the more confirmed 'tis so from this Debate. We are told, That Sir *John Fenwick*, or his Counsel, could not be ignorant of what they were to prepare themselves for, For this was our meaning, says one Gentleman, Though I find the Path is so untrod we are very unfortunate in expressing of it; for we have not said it at all in this Bill. We have said, Sir *John Fenwick* was Indicted, &c. Sir *John Fenwick* hath had a Copy of this Bill sent him, Counsel allowed him, and upon a second Reading he comes to make his Defence. We are told, The Proceedings upon this Bill are not to be resembled to the Proceeding in *Westminster* Hall, and this is sufficient in a Bill (though in an Indictment it would not) without alledging that Sir *John Fenwick* is Guilty. But one would think that every Allegation in the Bill, that is the Inducement to the Bill which is for Attainting of him, should be a good and just Ground for the Attainder; and then this Gentleman that hath had a Copy of the Bill to prepare for his Defence, and shew you Reasons why the Bill should not Pass, though our Proceedings are not to be resembled to the ordinary Proceedings, yet we are to expect from him such a Defence as the ordinary Proceedings in *Westminster* Hall would require: But I think this is hardly to be expected, One might have thought, and reasonably enough, That it might have come into his Imagination, that if there had been Ground to Attaint him, by the ordinary Proceedings and Methods of Justice, the Parliament would not have taken an extraordinary Course to come at it: For I can never think it a good Reason to proceed this way, that 'tis for the saving of time; and if there be an extraordinary

nary reason, they must guess at it out of the Bill ; Now the Bill is grounded upon those Suggestions that I have Cited ; and then I should have imagined, That whereas he had been Indicted upon the Oaths of two Witnesſes, as the Law requires, and one of them was withdrawn, that you had rather intended to have Charged him with ſome Contrivance to elude Juſtice, whereby you had reaſon to Exert your extraordinary Authority to proceed againſt him by way of the Legiſlature. And I do not find we have any Precedent to warrant this Proceeding, though in our Debates we have endeavoured to find one. And I can't but obſerve the Conſequence of this hereafter : For whether we can find a precedent to warrant this Proceeding in former Ages, we are making a Precedent for our Poſterity. And conſider the Conſequence of this Precedent you are making ; I think all the Bills in Parliament are guarded by the moſt ſerious ways of Deliberation, before you come to Judgment : And Bills of Attainder doe much more (ſure) require the ſeriousneſs of your Debates. But I can't but obſerve the ſteps now made. I am afraid there was a wrong ſtep at firſt. I was not here the firſt Day : But I recollect ſome things from the Bill it ſelf and the tenderneſs of thoſe things upon which this Enacting Clauſe does ſtand. Here was no Evidence given to induce the Houſe to bring in this Bill of Attainder. When this Bill is brought in, and the whole Preamble, that ſuggeſts that which is the ground of the Enacting part conſidered in the Houſe, and ſome Gentlemen did not think it reaſonable to proceed to the Reading of it a ſecond time, I remember we were told, Won't you Read it a ſecond time, when you may have an opportunity of having thoſe ſuggeſtions proved to you ? This was the Ground why this Bill ſhould be Read a ſecond time. For conſider, otherwiſe a Gentleman may in any other Caſe as well as this, deſire leave to bring in a Bill for Attainting ſuch a one, and tell you, you ſhall have good Reaſon given to
you

you for it afterwards ; and though the Reasons suggested in the Bill, are not sufficient, you may have Reasons out of the Bill that are sufficient. What a Precedent will this be ? Why, Sir, length of time gives a Sanction to those Precedents which the Age that made them thinks not of ; and they become good Examples to Posterity, that were even very heinous Precedents to the present times. Now if this shall stand, as now in the Bill, I would ask what Man in *England* is secure when a Parliament shall arise that hath a Mind to Attaint him ? Why then, Sir, if you do amend the Bill, consider the Method of your Proceedings. You do yourselves, in effect Declare, That for bringing in of the Bill, for twice Reading of the Bill you had no ground at all ; for otherwise you had good grounds Recited in the Bill, and that must be a sufficient ground to Attaint him ; and if you Declare it no sufficient ground to Attaint him, you Declare you have brought in a Bill, and Read it twice, without any ground. Whether you will allow liberty to offer at your Bar any Suggestions otherwise than in the Bill, that I must submit to you, and so for giving time, since that is a Question of a very extraordinary nature. But I have humbly offered my Thoughts, as to that Question, Whether any thing shall be offered otherwise than is suggested in the Preamble of the Bill ? I hope, you will not for the Precedent sake you are now making, which if you do, I am afraid Bills of Attainder may be now as frequent as Bills of Attainder were in *Richard* the II's. time, which I hope never shall be.

Lord Norreys. Mr. Speaker, I will not pretend to tell you that you are bound by other Rules than Rules of Justice ; but what is Justice in *Westminster* Hall, is so here, and every where. And last Year you thought it Justice that no Man should be brought to a Tryal, but he should know what were the particular Facts that were alledged against him.

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Lord Cutts. I think it, in some measure, a Misfortune, That a Matter of this nature, as is your present Debate, hath held you so long; and conceive it a thing to be wished, That every Gentleman that speaks upon this occasion, would apply himself more closely to substance, and less to Forms, I mean to Forms considered meerly as Forms, for it ought to be true Reason that is convincing to you: And you ought not to tye your selves to any Forms upon this occasion, but such as are grounded upon Reason; and really I have not heard any thing that fell from any Gentleman that shews his doubt of the nature and aggravating Circumstances of the Crime of the Prisoner; But it hath consisted with the great Candour and Justice of this House, to shew this Favour to the Prisoner before you. The Council say, they are unprepared; if they mean they would prepare themselves for more grounds of Difference and *Chicanry*, I would not give them farther time; I can't perceive there is any reality of Argument in it, and there is in Reasoning, as in Religion, sometimes a Form without a Power.

Sir Thomas Dyke. Sir, you have now two or three Questions before you. I desire you will confine our Debates to one point; I think whatever Opinion Gentlemen may be of concerning the Proof, the Point under your Consideration, if you will make a right Judgment, is the Preamble of your Bill, which I take to be the Foundation of it, and the Cause for which you Attaint this Gentleman. Now if the Preamble does not recite, and say, he is Guilty, but only Indicted, nor set forth any time; nay it does not say he was Arraigned, these things are very uncertain, and yet you must Attaint him for the things recited in your Bill. You know these Acts of Attainder are extraordinary Methods in Cases of Treason; and if you put it upon this Point, That the Act Attaints him for one thing, and the Council shall prove another, it makes it more uncertain than it is, and no
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Man can be safe. Therefore I hope you will confine the Counsel to the Proofs of the Matter contained in the Bill.

Mr. John Howe. Sir, I shall not move you to any thing that may tend to a delay of the Matter before you. I think, if you please to go on upon what is suggested in the Bill, they are Allegations which must be proved before the Bill is Committed, (and will not hinder Sir *John Fenwick* from being Examined to the Treason likewise.) Therefore all that is alledged in this Bill, (I suppose) being thought necessary to be proved, I desire he may be called in, and the Council may go on to prove what is alledged in the Bill, and afterwards Sir *John Fenwick* may Answer them.

Lord Coningsby. If the Question was, Whether you should grant this Gentleman time or no to make his Defence, I should not have troubled you? But the Question now seems to be, Whether the Bill does depend upon the bare Suggestions of the Bill, or upon the Guilt of Sir *John Fenwick*? And therefore if Gentlemen do insist upon it that he should have longer time to defend himself, as to his being Innocent or Guilty, I shall not oppose it; but if you think fit to put it off, as if the Fate of the Bill did depend upon the Suggestions of it, I can't agree to that. Therefore I desire a short time may be given him to Answer the Matter of his Guilt.

Mr. Harley. I find all Gentlemen that speak of this Subject, do say this Matter is of a very extraordinary Nature, and you have entered into it by very extraordinary Methods: But I must only observe, That this being the first Bill of this kind that hath been brought into the House, before any Proof, Gentlemen, must be excused if they are Cautious what steps they do take; and when the Wisdom of the House have thought fit to take quite different Methods, as to the Preliminaries, 'tis not to be wondered if they meet with difficulties in their Proceedings.

Some Gentlemen press for more Time to be given to Sir *John Fenwick* to be prepared ; and others urge, that you should declare, Whether the Council should be heard to any thing, but what is suggested in the Bill, and I think you must give a Determination to that Question first, though, the whole House agreed to give him longer Time : For if you give him longer Time, it will after come to the same Debate, Whether they shall be heard to any Thing but what is suggested in the Bill? If you should think fit to add any Thing to the Bill, then it will be reasonable that he also should be heard to that ; for in the Case of the Death of a Man, let him deserve never so much, yet he does not deserve to dye unjustly by your hands.

It seems a very plain Proposition, That when a Man is accused, he should not answer to what he is not Charged with ; and to charge it with *Inuendo's* and *Implications* is so uncertain, that as I always have seen it condemned in this House, so I hope I shall not see so great an Assembly give any Countenance to it. They did tell you, they were prepared to speak to the Reasonableness of the Bill ; but this Matter not being suggested in the Bill, they are not prepared to speak to it.

Sir *Tho Littleton*. I see now where your Debates have lead you. I thought the Regular Subject of our Debates had been the Point upon which the Council withdrew, and that was for Time. For what? Why to prepare themselves to Answer any Evidence that might be given against them, because they perceived you did expect the Council for the Bill should produce their Evidence. But they made an Objection; say they, We did not understand your Order was, that we should come prepared to oppose any Testimony *Viva Voce* to be given against us, but only prepared to speak to the Reasonableness of the Bill. Now, some Gentlemen, after Five or Six Hours Debate, have been willing to accommodate the Matter (that no Body might think that any one pressed a Matter

Matter unreasonable) that they might have Time. But others will not be satisfy'd with granting what the Counsel desired, but they desire more. And what is that? Why, that is to know the Opinion of the House, whether you will admit any one Thing to be proved that is not suggested in the Bill? and I do take this to be within the Suggestions of the Bill as fully as can be expressed. For what does the Bill say? The Bill does say, he was Indicted of High Treason, and that one of the Witnesses is gone. And Gentlemen, come to the Conclusion, and skip over the intermediate part of the Bill, for the Bill does say That he did meet and Consult, &c. And the Objection of the Counsel was not against the Evidence, but they said, They were not prepared at that Time to answer it, and there they leave it; and thereupon the House go upon the Debate. What can we expect that they intended? They might think, either we shall gain our Point, and the House will give us Time; or otherwise, if they go on, and hear this Evidence, then we may say we wanted Time. And so it will be only Evidence *ex Parte*, and not carry so much weight with it, though we have nothing to say to it. Or they might think it may have this Effect, That the House will not go on, and hear any Evidence at all and that in either of these Cases, they have the fairest Advantage that they can have, on the Second Reading of the Bill, in defence of their Client. All they desired was, That they might have Time, and I hope that which will satisfy them that are most concerned, may satisfy any Gentleman of the House.

Mr. J. How. The Question is not, What they asked, but what is Reasonable for us to grant? I must insist, Sir, That the King's Counsel may be desired to prove the Suggestions of the Bill.

Mr. Sol. Gen. Most that have spoke of this Matter have said, That the Matter is very generally laid in this Bill, and the Counsel could not very well know

know to what to apply themselves : That it speaks of *High Treason* in general, and of Aiding the King's Enemies, which is very General : It recites that indeed, but the *Indictment* is Legal, according to the late Act of Parliament. 'Tis not only said, That he designed the Death of the King, but for that purpose, he, and others, met together, and agreed to send *Charnock* to *France*, to go to King *James*, to induce the *French* King with an Armed Power to invade *England*. Now how can any thing be more particularly Charged ? And the *Indictment* is so Charged in your *Bill*. I think therefore the Council could not be ignorant to what they ought to apply themselves. But by what I perceive, some Gentlemen are very well contented to give him further Time. I remember, when the *Bill* was brought in, there was a long Debate for a second Reading, and some Gentlemen thought it hard to be tryed by so great an Assembly, and said, They had rather be tryed by a fewer Number : But I shall observe, That you have sent the Copy of the *Bill* to Sir *John Fenwick* before hand, and you sent him Notice that he should provide himself. I remember a much better Man than Sir *John Fenwick*, who had the Misfortune to be under an Accusation of *High Treason*, had his *Indictment* read to him one Hour, and was tryed the next, and though he desired to have his Tryal put off till the Afternoon, he could not prevail with that Court of Justice to do it. Sir *John Fenwick* hath had a Copy of his *Bill* for Two or Three Days, but the other never had any Copy of his *Indictment* till he had pleaded.

Mr. Waller. I stand up only for my Information ; that which I would know is, Whether the Council did not ask you the Question, whether they should be bound to answer any Thing that is not in the *Bill* ? If they asked that, then the Gentleman that spake here is answered ; and the Gentlemen of the House do not insist upon what Sir *John Fenwick's* Council did not insist on. And I do think the King's Ser-

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geant, who opened the Proceedings, after he had opened what had been before the Grand-Jury, seemed to make it a Charge, as if Sir *John Fenwick* had been condescending to the withdrawing of *Goodman*. Now that seemed, as if they designed to make that a Part of the Evidence.

Sir Richard Temple. The Council did not insist upon it only to answer the Suggestions of the Bill: Every Body knows, they objected to the others going on with the Evidence they opened, because it was not in the Bill; and the King's Counsel could not so much as alledge, that it was in the Bill; and they would have gone on to have proved the Indictment. There is another Thing: It is told you as if the Preamble had suggested something of this kind. That there was a Meeting. Now that Gentleman that spake last, but one, has cleared it, That it only recites he was Indicted for these Things, and this brings nothing in Issue, whether he be Guilty, or no? Now, I think, the present Question, and only Question before you, is upon the Suggestions of the Bill; for you can bring nothing in Issue here, but what is in the Bill; and no Body can insist by the Rules of Reason or Justice, That any Man should be heard to any Matter of Fact but what is in the Bill. And therefore I think there is nothing before you, but that you should give direction to hear them to what is suggested in the Bill.

Mr. Methuen. Sir, I speak to the Method of your Debates, which arise upon an Objection that was made by Sir *John Fenwick's* Council against the Council for the Bill's going on, with their Evidence to prove Sir *John Fenwick* guilty of High Treason.

I must beg leave to differ as to what the Council did say; for some of the Gentlemen that spake last, the force of their Objections was, That they should not now go on, for they were not prepared to Answer them; and the Reason they gave was, That they

they had not formal notice; And one of them afterwards spake to the shortness of the time. Your Debates for a long time went pursuant to this, Whether you should allow them further time or no? But the length of your Debates have raised a new Matter. And I think that Doubt, though it was not made by the Council, may be very properly made by any Worthy Member that hath that doubt, Whether as the Bill is brought in, the King's Council might at any time speak to that Point, though Sir *John Fenwick* be not acquainted with it? And I must always agree that Doubt ought to be resolved, before you come to resolve whether further time shall be allowed to him; and therefore I propose it, that this Question may be put, Whether the House will hear at the Bar of the House, the Evidence there is to prove Sir *John Fenwick* Guilty of the High Treason whereof he was Indicted?

Col. Wharton. You have three or four Questions upon your Paper; and now after so long a Debate as we have had, I hope Gentlemen, will not think fit to start new ones; and I hope you will take care that Gentlemen shall not rise up three or four times to speak to this Matter. You have another Rule of the House, That when a Question is moved, and seconded, though another Question is moved afterwards, yet that must be the first Question that is to be put, and I hope you will keep us to these Rules.

I wonder at some Objections. 'Tis told you, That this is such a Proceeding that never any thing of this kind was before; and that you are here going to Read a Bill of Attainder before you have had any manner of Evidence, upon which you should ground the bringing in of this Bill. Gentlemen must remember, or should have informed themselves; for 'tis very certain that you had very good Grounds to Vote this Bill to be brought in: I see the Gentleman that brought in his own Accusation; you had his own Discovery Read, and Mr. Attorney did inform you

what was against him, and how he stood Indicted. And another Gentleman by me told you, he was with him, and there was a Treaty for his Pardon; this was Evidence for reasonable Men to go upon: And to tell you that these Precedents would endanger your Liberty. Under favour, this is the ground of all your Liberty. 'Tis by this Power of Proceeding, when you have not that Evidence that *Westminster Hall* requires, by which you will keep Great Men in Awe.

Now give me leave to speak to the Question that I think you ought to put: 'Tis told you, by the Council for the Prisoner, That they are not Apprised what the Sense of the House was, and upon that Account they desired further time: I confess, when you allowed Council, I was of Opinion it was a favour; and now since they have made this Objection, though I do not believe you are obliged to allow them further time; yet I had rather Err on that than the other side; and therefore I think the fairest thing is to allow them some further time.

Mr. Secretary Trumbull. Mr. Speaker, I have attended all this Day to your Debates, which are now in my Opinion of a very Extraordinary nature; for a great deal of your time hath been spent upon Motion of the Council for the Prisoner at the Bar, whether you should allow them further time or no: And now, by what I recollect from the Sense of several Gentlemen, the House seems willing to allow them further time; even that is opposed at this time of day.

Sir, the King's Council have opened the Matter of Fact, upon which they did intend to produce their Evidence; and when they had opened the several Heads, the only Objection that I heard made by the other side, was, They did not think the King's Council could have proceeded to Examine Witnesses upon those Facts, and that they were not prepared to bring Witnesses on the side of the Prisoner, and therefore prayed for further time; truly, whether

whether that be reasonable or no, or whether upon one Favour the House think fit to grant another : I can't tell what might be, if it had come to a Question, since the Life of a Man is concerned, we ought to be tender of it, and I shall be as tender as another ; Therefore I am of Opinion, that a reasonable time should be allowed. To do what ? Why, upon the Evidence the King's Council shall produce, they shall bring their Witnesses on the other side to Answer them : Whether the King's Council will produce Evidence that is foreign to the Bill, that will be in Judgment of the House ; but it was a good Motion made below, which I close withall, That a short time may be allowed them to make their Defence, and bring their Witnesses.

Mr. Speaker. Gentlemen, you have had a long Debate ; I don't remember any formal Question that was proposed at first, till such time as I Read to you what I thought was the Question upon the Debate ; when I Read you the Question for further time, there were several Members stood up, and said, That was not the Question ; and took Exceptions to it, and proposed that the Council should be confined to produce Evidence only to the Matters suggested in the Bill ; so that now I have two Questions upon my Paper, which I will Read to you, and put which you will. One Question is, *That they be confined to make their Proof to what is suggested in the Bill.* The Second Question is, *that Sir John Fenwick be allowed further time, &c.*

Sir Christoph. Musgrave. A Gentleman said, the second Question upon your Paper was but lately started ; but I remember, a little after the Council was withdrawn, it was moved, Whether you would give them further time ? And I presently after in the Debate did take the freedom to ask, Whether it was intended they should Answer to any thing but what was contained in the Bill ? And I remember there was a Gentleman of the long Robe said, That there was

nothing offered by the King's Council, but what was within the Suggestions of the Bill. Another Gentleman said, when they may have longer Time, they did not seem so fond of it; 'tis indifferent to me, provided he be prepared to Answer. But I can't but observe, That the Conclusion of that honourable Person was, that at last you must come to determine the Question. You were likewise told, by an honourable Person nearer the Bar, Why do you Dispute this, now you have ordered the King's Council to produce the Evidence, and so you have Concluded your selves. But for my self, I must confess I did never think the Evidence was to be heard otherwise than as to the Suggestions of the Bill. And if that Point be to be determined, Why will not you determine it now, rather than to have another Debate upon it?

Mr. Boscawen. That which is pressed by some Gentlemen, is begging of the Question. What have we here brought Sir *John Fenwick* for? Was it not to satisfy our selves, whether Sir *John Fenwick* was Guilty of High Treason? Now that is supposed by some Gentlemen not to be within the Bill: If it be not within the Bill, I desire you would throw out the Bill. But the Thing is, we must not examine to those Things that will make Sir *John Fenwick* Guilty. Sir, This is a very nice Thing, and very curiously woven. The great Thing, say some Gentlemen, we must take care of is the Blood of a Man? Does any one say he is Innocent? No; but we must have some way or another that he must not be brought to his Tryal. I desire, as *English Men*, you will not only take Care of the Life of one Man. but of the Life of the King; of the Lives of our Wives and Children, and all our Families. What will they say without Doors? You are afraid to meddle with Sir *John Fenwick*; and therefore you will slide it away upon another Point, That his being Guilty of High Treason is not within the Bill. I am not for taking the Advantage of Time; I desire, as it was moved before

fore, That you will give him Time, and try whether he be Guilty of this Treason or no, or otherwise do nothing in it at all.

Then the Order was made for Candles to be brought in. Which was done.

Sir Tho. Littleton. Now you have Candles brought in, it will be fit for you to return to the Question: For my part I am willing to put both, but I think the last Question that you have upon the Paper, properly speaking, is to be put first, and that is, That the House will proceed to examine Witnesses to the Treason in the Bill for which he stands Indicted.

Mr. John Howe. I think the Question ought to be, That his Council be directed to bring Witnesses to the Allegations in this Bill.

Sir Tho. Littleton. I propose it to you thus, That the House will proceed to examine Witnesses at the Bar, to the Treasons mentioned in the Bill for which he was Indicted.

Mr. J. Howe. I think that Gentleman might very well have moved the Question without that Limitation; for that is as much as to say, That Witnesses shall be examined to none of the Treasons in the Bill except those for which he hath been Indicted; and that is a Limitation I hope shall not be put to the Enquiries of this House. I hope you will put it, That they shall bring Evidence to the Matters alleged in the Bill, generally: There are several Allegations in the Bill of which he was never indicted, which I would have him answer to, as the Alienating the Affections of the King's Subjects from him, which I suppose to be Treason.

Members. No, No.

Mr. John Howe. Why, if it be not High-Treason, it hath nothing to do in that Place.

Another Member. Sir, I do not know how the Question may be carried since Candles are come in, but I think 'tis for the better. I think there are two Things have been spoke to; one is this Bill: I find

those Gentlemen that were against the Bill on Friday, are more against it now. I was for the Bill then, and am now for a Second Reading of it : I think the Bill is very plain, and know not what they would have mentioned in it more, unless they would have had the *King's Head Tavern*, and what Wine they drank there. I think there is all the Reason in the World to hear the Witnesses to prove him Guilty of High Treason. As to the Point of Time, I should be very willing to allow it them, if that Question was put ; and I think you have been very favourable to him already, in allowing him Council.

Mr. Smith. I would only observe, when the Bill was to be brought in, the Objection was, That you had not Witnesses. And now the Question is, Whether you can hear Witnesses upon Facts not particularly assigned in the Bill. I believe no Man can say, but that in the Indictment there are particular Facts that ought to be Examined : I do own, for my part, if Sir *John Fenwick* was a greater Man than he is, It were better he should Escape, than you should spend so much time about him. Sir, the Indictment is mentioned in the Bill ; no Man thinks that *Goodman's* going away, is Reason enough for bringing in such a Bill against Sir *John Fenwick*.

Mr. Speaker. Shall I read you the Question,

That Sir John Fenwick be allowed further Time to produce Witnesses in his Defence, against the Charge of High Treason, and that he give in a List of his Witnesses to the Speaker ?

Which Question was put, and passed in the Affirmative.

Mr. Speaker. The other Question is,

That the Council, who are to produce their Evidence against Sir John Fenwick, be allowed to prove Sir John Fenwick Guilty of High Treason ?

Sir Tho. Littleton. I do think one of the Reasons why this Bill was brought, was, Because possibly, by

by the Absence of this Witness, he could not, strictly speaking, be proved Guilty; though all Mankind is satisfied in his Guilt. And therefore I question whether it will amount to a Legal Proof: And if you had such a Proof as would convict him by the common Proceedings of Law, I should not have been for a Bill of this nature: For 'tis against the Honour and Dignity of this House to do the Work that an inferiour Court can do. But probably, by the Absence of this Witness, Sir John Fenwick at a Tryal in the *Old Baily* might Escape, though at the same time 'tis highly probable the Witness that is wanting to Convict him, is by his means gone out of the way. Therefore I speak to the wording of your Question, you say, *Shall be allowed to prove.* I would willingly prevent what may be Objected when we come upon this Debate: if you do use the Word *Prove*, they may say, this is not Proof; for still Goodman is not here. If you please to say, *That we will examin Witnesses to the Treason*, and we will be Judges how far it appears to us, whether he be Guilty, or not Guilty.

Mr. Speaker. Will you let me propose it to you thus then, *That the Council, in producing their Evidence against Sir John Fenwick, be allowed to examine Witnesses touching the Treasons mentioned in the Bill, for which Sir John Fenwick is Indicted?*

Mr. James Mountague. I do not observe, that in Reading of it, you say any Thing as to the other Allegations of the Bill: I think you should word it, *That the Council be allowed to produce Evidence to the Allegations in the Bill, and the Treasons whereof he stands Indicted.*

Mr. Speaker. Well then, the Question is this, *That the Council in managing the Evidence against Sir John Fenwick, be allowed to produce Evidence touching the Allegations in the Bill, and the Treasons for which he stands Indicted.*

Which Question being put, it passed in the Affirmative.

Mr. Speaker

Mr. Speaker. Will you please to appoint a time for it?

Mr. J. Howe. I humbly move you, having been so extreemly late before you went upon this Information, that you had not time to go through any part of it; That you would appoint early in the Morning for Sir John Fenwick to be here.

And thereupon the House resolved to proceed further in the matter on Monday at 10 a Clock, and Ordered, That Sir John Fenwick should be remanded to Newgate, and brought again to the House at that time.

Mr. James Montague. Sir John Fenwick now insisted he had not notice; I humbly move, that he may be brought in, and acquainted with what you have Ordered.

Accordingly Sir John Fenwick was brought to the Bar.

Mr. Speaker. Sir John Fenwick., The House have considered of what you said at the Bar, by your Counsel, and they are of Opinion, That Witnesses ought to be Examined, to prove the Allegations of the Bill, and to prove you Guilty of the High-Treason whereof you stand Indicted. But in favour to you, because your Counsel said you were not prepared, the House is willing to give you time till Monday next, to make your Defence; and they require you to give in a List of your Witnesses, and if you send to me, you may have a Warrant for their appearing at that time; and they require you to be here, so that they may proceed upon the Bill exactly at Ten a Clock.

And Sir John Fenwick being withdrawn.
Resolved,

That the Bill for Attainting Sir John Fenwick of High Treason, be Read a second time on Monday next.

Lune 16 die Novembris, 1696.

The House order'd that the Speakers Chamber and Lobby should be cleared of all Persons, but the Members

bers of the House, and Sir John Fenwick, the Council, Witnesses and Solicitors. And that the back doors of the Speaker's Chambers should be locked up.

Mr. Speaker. Gentlemen, I would receive your Directions in one thing. You have Ordered a Member to produce a Letter, and the Counsel, in opening the Evidence, have referred to it. That Member desires to know the proper time for him to do it, Whether while the Counsel are managing the Evidence at the Bar, or whether he must stay till they are withdrawn?

Mr. Sloane. As to this Matter, I do not question but 'tis to be offered as an Evidence; and by the same Reason that you give Sir John Fenwick the favour to Examine the Witnesses that are produced against him, for the same Reason the Letter ought to be Read in his presence, that he may explain it, or deny it if he think fit. And give me leave to tell my Thoughts of another Matter. If that Worthy Member is to offer Evidence of what he took from Sir John Fenwick's Mouth, (though a Member commonly gives his Evidence in his place after the Counsel is withdrawn) I think 'tis not only fair to produce the Letter in his presence, but that Sir John Fenwick should hear what he says, and deny it if he can.

Mr. Speaker. Is that your Pleasure, *that the Letter be produced before Sir John Fenwick, and that the Evidence to be given by Mr. Vernon shall be while Sir John Fenwick is at the Bar?*

The Question being accordingly put, it passed in the Affirmative.

Then the Sergeant was Ordered to take his Mace, and go into Westminster Hall, and Summon the Members to attend immediately, (which he did).

And being returned, the Order of the Day for Proceeding on the Bill of Sir John Fenwick was Read.

Memorandum, It was a quarter before Eleven in the Morning.

Then

Then Sir *John Fenwick*, and the Council and Solicitors, on both sides were brought in.

Mr. *Speaker*. Sir *Thomas Powys*, When you were here last, you insisted upon it, That the Council against Sir *John Fenwick* should be kept to the Proofs relating to the Allegations in the Bill only ; or else that you might have further time, because the Witnesses were not ready. The House have considered that Matter, and in favour to Sir *John Fenwick*, that he might have no surprize, have given him to this Day ; But they do allow the Council to give Evidence not only as to the Allegations in the Bill, but to prove Sir *John Fenwick* Guilty of High Treason ; and therefore Mr. *Sergeant Gould*, you are at liberty to go on with your Evidence.

Mr. *Sergeant Gould*. May it please you, Mr. *Speaker*, We are here to give in our Charge, and the Evidence that we have against Sir *John Fenwick*, I find by your Order, That we are now allowed to produce Evidence touching the Allegations of the Bill, and likewise of the Treasons for which he stands Indicted ; therefore I shall beg leave to open first, How he stands Charged by the Indictment.

The Indictment first Charges him with Compassing and Designing to Depose the King, and put him to Death. The Second Charge is, For Inciting the French King to send an Army of Soldiers to Invade this Kingdom, and to make a miserable Slaughter amongst the Kings Subjects. The Third thing is, For adhering to the King's Enemies. The Fourth Part is, That to effect this, he, together with *Charnock*, Sir *John Friend* and others, did Consult, Propose, Treat, and Agree to Invite the French King to send a Number of Soldiers to Invade this Kingdom, and to Procure great Numbers of Armed Men against the King, to Rise and be Formed ; and with the Enemies of this Kingdom, upon their Landing and Invading thereof, to Joyn, for to Make and Carry on a Rebellion and War in this Kingdom. And further

it

it Charges, That he did Consult, Consent and Agree, to send *Charnock* as a Messenger from Sir *John Friend*, and others, into *France* to the late King *James*, to Propose to him, to procure the French King to send Soldiers and Armed Men to Invade this Kingdom. Then likewise to Effect this, the Indictment Charges him with Providing Horses, Pistols, and other Warlike Arms. This is the Charge of the Indictment; and these Matters are in the Bill: For the Bill does Charge him with Compassing and Imagining the Death and Destruction of the King, with Adhering to his Enemies, by Consulting and Agreeing with several Persons at several times, to send *Charnock* to the late King *James* in *France*, to Invite and Encourage the French King to Invade this Kingdom with Armed Forces, and Promises to Joyn them, and Assist them with Men and Arms.

Then the Bill does take notice of other Matters, That Sir *John Fenwick* hath Protracted his Tryal, by giving Assurances to the King to make a plain and full Discovery; by reason of which he put off his Tryal, and now one of the Witnesses against him is withdrawn. May it please you, Sir, This is the Charge as it stands before this Honourable House. And the Evidence we shall Charge him with, will be of this Nature; We shall give you an Account, That the latter end of *May*, or beginning of *June*, Sir *John Friend* and *Charnock*, and several other Persons, met at the *King's-Head*, and upon that Meeting they Consulted how to Invade this Kingdom; and they Concluded in this, That they would send *Charnock* into *France*, and he was to Propose it to King *James*, That he should Procure 8000 Foot, and 2000 Horse and Dragoons of the French King; and upon their Landing they were to Joyn them with 2000 Horse. After this they had another Meeting; (for *Charnock*, to be sure of the Matter, would have another Meeting) and then *Charnock* Proposed it to them, Whether they continued in the same Resolution? And they

they all then Declared, particularly Sir *John Fenwick*, That they did approve of it, and Stuck by it, and that *Charnock* should go for that Purpose to *France*. *Charnock*, in Pursuance and Execution of this Treason, did go to *France*, and afterwards brought back an Answer, That the Matter had been Communicated to the *French King*, but at that time he was not ready for them, and could not spare his Soldiers, or Troops. Then it rested for some time, till towards *Christmas*, when Sir *George Barclaye* came into *England*, and he brought with him a Detachment of about Sixteen, and their Province was to *Assassinate* the King : But there was another Part, and that was the *Invasion*, and in that Part was Sir *John Fenwick* Concerned, which we shall produce our Evidence to prove upon him. But it does fall out that we have but one Witness to this Matter that we can produce *Viva Voce*; though when this Indictment was found, (for it was found upon the Act last Sessions, which required two Witnesses to each Species of Treason) we had two, but one is since withdrawn, and that is touched in the Bill, as in truth the Fact is. If Sir *John Fenwick* had come on in the Ordinary Court of Proceedings to be Tryed, Sir *John Fenwick* might have been Tryed upon his Indictment, for then *Goodman* had been here; but he Procrastinates his Tryal, he makes Application to the King, and gives him Assurances from time to time of an Ingenuous Discovery till *Goodman* is withdrawn, and then these Assurances terminate in this Counterfeit Confession that hath been laid before the House, and is Charged in the Bill.

But, Sir, to supply this, we shall produce the Examination of Mr. *Goodman*. We shall prove to you not only the Evidence that hath been given upon this Indictment upon which he hath been Arraign'd; but also the Evidence which hath been given upon the Tryal of *Cook*, who was Convicted upon that Evidence. We shall go by these further steps in the

Cafe,

Cafe, and humbly offer it to the Consideration of this House, how far Sir *John Fenwick* will be affected with it, and that is this. There was *Goodman*, and Captain *Porter*, Witnesses against Sir *John Fenwick*, Captain *Porter* still stands his Ground; but they have tempted him with 300 Guineas in hand, and 300 more were to be remitted to him upon his first Landing in *France*, with Assurance likewise of King *James's* Pardon, and likewise 300 l. a Year; 100 l. a Year whereof was to be settled by Sir *John Fenwick*. This Proposition sprung from one *Clancy*: It could not be expected that Sir *John Fenwick* should appear in his proper Person, but he did make it by his Lady, who was with Captain *Porter*, and gave him Assurance that all that was Proposed by *Clancy*, should be Performed, and a great deal more.

We shall further give this Account, That when Sir *John Fenwick* was taken, there was a Letter handed to a third Person; and it appears by that, that he thought himself at that time not safe, unless they could corrupt the Jury: For, says he, *we must now get Two or Three Stanch Persons that will starve the rest*. These Steps we shall proceed upon, and begin with the Indictment, and call our Witnesses to it.

Mr. *Serg. Lovel*. Mr. Speaker, I shall not repeat what hath been said; because I know what hath been materially said, can't pass the Observation of this House. The Method we desire leave to proceed in, is the Method you have prescribed us: and that is, first to prove the Allegations of the Bill: And we shall make it appear to you by undoubted Proofs, That Sir *John Fenwick* does stand indicted for these Treasons at the Sessions at the *Old Baily*, the 28th of *May*, upon the Oaths of *Porter* and *Goodman*, that we shall prove by Records, and that is not Capable of any Traverse or Denial. We shall also prove by matter of Record, That several, who were concerned with Sir *John Fenwick* in this Conspiracy, have been Tried and Attainted; and then we shall call a living Witness

ness to prove Sir *John Fenwick* guilty of Treason in the highest Manner. Mr. *Tanner*, deliver in the Indictment of Sir *John Fenwick*.

Which was delivered in, and read at the Table,

Mr. *Serg. Lovel.* The Bill does Charge, That he stands Indicted upon the Oaths of these Two, Captain *Porter* and Mr. *Goodman* : Besides I must beg leave to observe, that by the Act of Parliament made last Sessions, 'tis Enacted, That no Person shall be Indicted unless upon the Oaths of two Witnesses ; had not these Witnesses been Sworn before the Grand Jury at that time, this Bill could not have been found according to that Law, nor would Sir *John Fenwick* have pleaded : But he hath been Arraigned, and Pleaded ; so that we submit it to this House, that it does appear upon Record, That this Indictment was found upon the Oaths of two Witnesses : Besides that, two Witnesses are subscribed to the Bill. Now that other Persons have been Indicted, and Convicted upon the same Evidence, we shall prove, and that likewise by Records.

Mr. *Sergeant Gould.* I thought when we came to give you an Account of the Absence of *Goodman*, then to have given you an Account, of this and other Matters.

Mr. *Speaker.* You will agree upon your Method, Gentlemen : Who do you call in the first Place ?

Mr. *Serg. Gould.* Captain *Porter*, Sir.

(Who being present.)

Mr. *Serg. Gould.* I desire, Mr. *Speaker*, that he will give an Account of what he knows concerning this Matter, as also of what is Charged in the Indictment.

Mr. *Speaker.* Captain *Porter*, the House requires you to give them an Account of your Knowledge of any Conspiracy, by Sir *John Fenwick*, against the King and this Government ; and likewise of your Proceedings upon the Indictment against him for High Treason.

Capt.

Captain Porter. About the middle of *May* was Twelve-months, there were two Consultations, one at the King's Head in *Leadenball-street*, and the other in *St. James's Street*; these two Consultations were for the Considering of the best Means to bring the late King *James* into *England* again: For it was said, That King *William* being gone beyond Sea, he had left but few Forces, and therefore they thought they could not have a fitter Opportunity than that Juncture; upon which they pitched upon *Charnock* to go into *France*, and make some Proposals to the late King *James*, to borrow 10000 Men of the *French King*, whereof there should be 8000 Foot, 1000 Horse, and 1000 Dragoons; and it was proposed, when they came over to meet him with 2000 Horse.

Mr. Speaker. Where was this?

Captain Porter. Our first Meeting was at the King's Head in *Leadenball-street*; after that, *Mr. Charnock* desired another Meeting, and then we met at *Mrs. Mounjy's* in *St. James's*, and we all stood to what we had before Resolved, That he should go over to King *James*, and make this Proposal; and that if he could get so many Men of the *French King*, we would meet him with so many Horse.

Mr. Speaker. Sir, you say the first Meeting was at the King's Head in *Leadenball-street*, who was then present?

Captain Porter. There was my Lord *Aylesbury*, my Lord *Montgomery*, Sir *John Fenwick*, Sir *John Friend*, Sir *William Perkins*, *Charnock*, *Mr. Cook*, and myself; we Dined there, and after Dinner *Mr. Goodman* came in to us.

Mr. Speaker. Did Sir *John Fenwick* hear this Discourse?

Captain Porter. Yes, Sir.

Mr. Speaker. Did Sir *John Fenwick* consent to it?

Captain Porter. He did absolutely Consent to it.

Sir *John Friend* did propose to bring Four or Five Thousand Men, but says Sir *John Fenwick*, Do not let us propose more than we can bring.

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Mr. Speaker.

Mr. Speaker. Then you say you had a Second Meeting.

Captain Porter. When we agreed upon this Business in *Leadenhall-street*, *Captain Charnock* desired another Meeting, to know if we continued in our Resolution, and the next Meeting was at *Mrs. Mountjoy's*, I think then my Lord *Mongomery* was not there, nor *Mr. Goodman*, but there was my Lord *Aylesbury*, Sir *John Fenwick*, Sir *John Friend*, Sir *William Perkins*, *Mr. Charnock*, and my self.

Mr. Speaker. How long after?

Captain Porter. About Eight or Ten Days, to the best of my Remembrance.

Mr. Speaker. What was said at that Meeting?

Captain Porter. The Second Meeting was to agree to the same Thing : We desired *Charnock* to go as soon as possible to acquaint King *James*, that the sooner he came that Year the better.

Mr. Speaker. Did Sir *John Fenwick* consent and agree at the Second Meeting, to his going into France to procure the Forces?

Captain Porter. Yes, Sir.

Mr. Speaker. Will you give the House an Account of any thing else you know relating to this Matter?

Captain Porter. That is all.

Mr. Sergeant Gould. Was you Examined by the Grand Jury, when the Bill was presented against Sir *John Fenwick*.

Captain Porter. Yes, Sir.

Mr. Sergeant Gould. What Evidence did you give to them?

Captain Porter. The very same I give now.

Mr. Speaker. Mr. *Sergeant Gould*; what have you to say further to him?

Mr. Sergeant Lovel. We would ask, whether Mr. *Cook* was at the first Meeting.

Captain Porter. Yes, Sir, he was at both Meetings?

Mr. Ser-

Mr. Sergeant Lovel. Was *Mr. Goodman* at the preferring of the Bill of Indictment at the *Old Bailey*?

Captain Porter. I saw him go in to the Jury, and he told me it was for the same Thing.

Mr. Sergeant Lovel. We have some of the Jury here, and we will call them to that.

Mr. Sergeant Gould. Now, if it please you, Sir, we will ask him to the Matter concerning *Glancy's* Tampering with him.

Mr. Speaker. Will you give the House an Account of that Matter?

Sir Thomas Powys. By your Favour, I hope you will give us leave to interpose in this Matter: For I am sure in the case of Life, and in case where there is a Law prepared to be made subsequent to the Fact, to condemn a Man to Death, you will not only have good Evidence but that which is legal Evidence. And I take it that in Cases of this Nature, of a subsequent Law, the Evidence ought to be much stronger, and much fairer, than when a Man is to be tryed by a Law in Being. If they should offer that which was said in the great Case of my Lord of *Sirafford*; (which Attainder there hath been an Act of Parliament to Reverse) by a Gentleman that did then appear against my Lord *Sirafford*, That where the House proceed in a Legislative way, there needs no Evidence at all, but every Man may follow the Dictates of his own Thoughts and Conscience. 'Tis in *Rushworth's History of that Tryal*, fol. 377. Yet, I hope, you will be of another Opinion and expect stronger Evidence, than if a Man was to be tryed by a Law in Being. Now that which is offered, cannot be allowed in any Court of Justice: They were going about to shew, That my Lady *Fenwick*, the Wife of the Gentleman at the Bar, had used some means to take off *Goodman's* Evidence, and they would make use of that against her Husband. Now what any Man's Wife says cannot be made use of against him, as nothing that she says, or does, can

be made use of for him; and, by the same Rule of Justice it cannot be made use of against him: For otherwise the Rule would be unequal, That she might be a Witness against him, but not a Witness for him; that seems so unjust, that it will not be admitted in any Court whatsoever.

Sir Barth. Shower. By your Votes the Prisoner is allowed Counsel, and the King's Sergeants are to produce the Evidence against the Prisoner. We believe, and hope therefore that you will give us leave to object to that which is not so; and in this I appeal to the knowledge of the Gentleman on the other side, who hath had a great deal of Experience of this kind: and dare say in all his Observations in the *Old Bailey* he can't produce an Instance where the Actions or sayings of other Persons, were admitted as Evidence, in Case of Treason, nay not in Felony; and I must confess I wonder to hear him move it now.

When attempted on behalf of a close Prisoner, that was not Visited by any Body, it was not admitted that the Actions of a third Person at large, should be admitted against him: There the Actions of a Wife cannot be Evidence for, nor against her Husband. It was never but in one Case, and that for Sodomy, allowed, and that was after two or three Witnesses besides had been produced, and by the Opinions ever since it hath been allowed not to be Law: and that for the Mischief might follow to the dissolution of Marriage and Ruin of Families. Now what they offered does concern the Acts of other Persons, and not *Sir John Fenwick*. Besides I have one Objection more, and that is, There is no such thing alledged in the Bill; and the Order is, That they should produce Evidence as to the Allegations in the Bill, and the Treasons in the Indictment; but I never heard of any Order that they should produce Evidence concerning the carrying away of any Witness; and 'tis not alledged, that *Goodman* is withdrawn by *Sir John Fenwick's* Privy: As to *Porter's* being tamper'd with there

there is no colour of Suggestion in the Bill ; so that this neither being in the Bill, nor being Evidence at Law, we hope you will not admit it.

Mr. Speaker. You hear the Exception, What do you say to it ?

Mr. Sergeant Gould. I think what these Gentlemen say, will receive a plain Answer. It is an Allegation in the Bill, That *Goodman* hath withdrawn himself. Now the use we make of this, is to let us in to give an Account of what *Goodman* hath Sworn, and to Entitle us to read his Examination : For say we, *Clancy* hath been tampering to stifle this Conspiracy, to take off the King's Evidence. No Body doubts of this Execrable and Wicked Conspiracy, and 'tis as plain here hath been two Witnesses to prove it, and as plain that this Indictment is found, according to the late Act of Parliament, upon the Evidence of *Parker* and *Goodman*. Now to shew this Conspiracy is carrying on, we offer to prove the tampering that hath been, to take off the King's Evidence, and would lay that before the Consideration of this House ; so the use we make of it, is only preparatory to let us in to tell you what *Goodman* hath Sworn, and in good time we shall produce to you an Indictment, by which it will appear that upon his Oath, and the same Evidence as we offer here, another of the Traytors hath been Convicted. And therefore we humbly offer it, Whether as this Case is, we shall not be admitted to prove this tampering ?

Mr. Serg. Lovel. Before we withdraw, I beg two Words as to what is Objected on the other side ; for the learned Gentleman Appeals to me, and I must Appeal to the Knowledge of some Members that are learned in the Law, That even in Criminal Cases, the Courts are not bound up to positive Evidence, but that the Evidence of Circumstances, with some Persons to corroborate them, is Admitted : And if it should be so, that nothing but positive Evidence should Convict, we should have very few Convicti-

ons at the *Old Baily*. As to Clipping and Coynring where one is Convicted by positive Evidence and direct Proof, forty are Convicted and Attainted by Circumstances, as Materials found about them, and putting off Counterfeit Mony. Sir, I must submit to you, Whether, as the nature of this Case is, this House will not think fit to hear all Evidence that may concern this Matter, whether Positive or Circumstantial; and the Wisdom of this House will distinguish afterwards, what they think is material, and what is not. We do take this to be part of the same Conspiracy which we do Charge the Prisoner at the Bar with, that he might not come to Condign Punishment, and therefore we pray, that let the Proceedings of other places be what they will, that you will hear the whole Matter in this Case, whether the Evidence be Positive or Circumstantial.

Sir *Tho. Powys*, I think they mistake us when they give us such an Answer; we doubt not but there is Positive Evidence and Circumstantial, but we suppose this to be no Evidence at all: Mr. Recorder tells us true, That Circumstantial Evidence is frequently made use of; but we say, That whatever my Lady *Fenwick* hath said or done, is not to be Admitted as any Evidence against the Prisoner at the Bar; because what she hath said by way of Endeavour to draw off *Goodman*, is no Evidence at all to be offered against her Husband, and is not so much as Circumstantial Evidence.

Sir *Barthol. Shower*, We do Agree, That if the Bill had been brought in against my Lady *Fenwick*, or against *Clancy*, this had been proper Evidence; and they may deserve Punishment for it themselves: But this is no Evidence against Sir *John Fenwick*, to prove a Crime against him.

Mr. *Serg. Lovel*. We think 'tis properly before the House, even by the Order of the House it self, For in the first place, we are to speak to the Matters contained in the Bill. One Matter is, That Sir *John Fenwick*

Fenwick had been Tryed before now, but for Reasons mentioned in the Bill, and that he delayed his Tryal, till such time as *Goodman* was withdrawn; therefore what lies before us by the Direction of the House, is, That till such time as *Goodman* was withdrawn, Sir *John Fenwick* did pretend to go on to make a Discovery, and afterwards put it off with what is Charged in the Bill: But say they, What is done by my Lady *Fenwick*, is no Evidence against him. When all the Circumstances are laid before the House, what dealings there was with Captain *Porter*, and what was said at that time, and the Consequence, presently after *Goodman's* going away, I hope it is as much Evidence as the Case will bear.

Sir *Richard Temple*. Sir, I Desire they may withdraw.

Accordingly they withdrew.

Sir *Richard Temple*. I think it much concerns the Honour of the House, when a Prisoner is at the Bar, that he should be allowed the Right of an Englishman; what you do here, may be a Precedent in after Ages. You are told what is offered as Evidence here, is admitted in no Court, and the Answer that is made to it, is of no force at all. They tell you there is no Allegations in your Bill, That Sir *John Fenwick* had any hand in his withdrawing, nor nothing in the Indictment of it, and for that Reason the Evidence seems improper, and if it was, this would be no Evidence at all against Sir *John Fenwick*, for Oaths against other Persons is no Evidence against the Prisoner to make him Guilty of any thing.

Lord *Cutts*. I think 'tis Agreed already, That the Council for the Prisoner should not meddle with the Authority and Jurisdiction of this House. For if we are to be tied up to all the Forms and Niceties observed in Inferior Courts, then to what end is the Prisoner brought here? I think Evidence ought to be Admitted that may clear every Man's Conscience, that this Bill against Sir *John Fenwick* ought to pass.

Mr. John Howe. A Gentleman said, we are not tyed to the Forms of Inferiour Courts; but though we are not to the Forms of Inferiour Courts, we are tyed to that which was the Ground of them, and that is right Reason and Justice: They have alledged that he was Indicted, no body doubts it. That Goodman is withdrawn, no body doubts it: But what is that to Sir John Fenwick? It might be with a design for Good or Evil to Sir John Fenwick. I desire you would ask Captain Porter when he comes in, Whether this was Discourfed before Dinner, at Dinner, or after Dinner? And whether he knows that Goodman heard this?

Mr. Chancellor of the Exchequer. There seems a particular shyness to know the truth of this Matter, I mean in the Council the other Day; the Gentleman says that Goodman might be withdrawn to the Prejudice of Sir John Fenwick, as well as for his Good. I desire you will not let the Government be so Stigmatized. You have given leave I presume to the Council to Examine to any thing that may be added to the Bill; for upon a Commitment, I can move you to put in any thing that shall be thought reasonable.

Sir Thomas Dyke. It may be a reasonable thing to Enquire why Goodman is withdrawn. But the Question is, Whether this be a proper time? The House is not tyed to the Common Forms of Law, but they are tyed to the Common Rules of Equity: And the Question is, Whether the House will permit any Person to suffer by the Acts of another?

Mr. Sol. Gen. It is Discretionary, whether you will determine that this is Evidence now, or after you have heard it; but I won't enter upon the Legality of the Evidence. 'Tis one thing when a Man is to be Tried by a Jury, and another thing when he is to be Tried before Judges. A Jury may be so Swayed and Possessed by it, that it may not be fit for them to hear it: But look into the Court of Chancery, and their Depositions, if one side say they,

they, are Evidence, and the other side say they, are not, are every Day Admitted to be Read, and 'tis generally said, that it is sooner dispatched by hearing of it, than not. You do not sit here as a Jury only, but as Judges also; and will consider how far the Actions of a Wife shall concern her Husband. You will do the Prisoner right, and your selves right, if you will hear the Witness.

Sir Francis Winnington. The Question is, whether the King's Counsel——

Mr. Speaker. Let me set you right, they are not here as King's Counsel.

Sir Francis Winnington. Very well. But in this House you are the Judges and Jury too. The Evidence that is opened, is to induce you to believe, that he is Guilty, and the Gentleman that spake last, will not allow it to be a Legal Evidence. Then the Question is, Whether you being Judges of the Fact, as well as of the Law, should be afraid to be induced to believe a Fact, by that which is not Legal Evidence? Suppose my Lady *Fenwick* had had this Design, and had told her Husband what she intended to do, and he should have said, he scorn'd it, This is possible, if you go to supposing, and that he might apprehend it would do him a mischief. Now it can be to no purpose to hear this Evidence, unless it be to satisfy the House, in Order to Attaint the Prisoner. No, but say they, Let us hear, and we will judge afterwards: Why so? It can't affect the Prisoner. And if any Person hereafter have a mind to have my Lady *Fenwick* Punished they may examine it.

Mr. Sloane. The Gentleman that spake last, hath made one supposal. Let me make another. He supposes, That it may appear by the Evidence, upon the Examination of Witnesses, that what my Lady *Fenwick* or *Clancy* did, was contrary to the Direction of *Sir John Fenwick*: If the Evidence happen to be so, 'tis nothing. But we may suppose again; Sup-

pose it happens, that it appears by the Evidence that it was for the Benefit of Sir *John Fenwick*, as in truth it was, to the greatest Degree, to get away one of the Witnesses, & *Cui bono*, is the strongest Presumption to me. I do allow in *Westminster Hall*, that a Woman shall not be a Witness for or against her Husband; but if she be directed by her Husband, *Qui facit per alium, facit per se*, What she does by his direction may be Evidence. You do not alledge all the Evidence in the Indictment, that runs in general. If the Evidence differs as to time and place, the Jury may find him Guilty of the Indictment.

Lord Norreys. Because I would not willingly go upon Suppositions, I desire the Clerk may Read the Question that you have passed the last Day as to Examining Evidence.

Which was accordingly Read.

Now I desire to know, whether this be Treason within the Indictment, or any of the Allegations of the Bill. Otherwise I think you have tyed yourselves up by that Rule.

Mr. Pelham. I did expect the Gentleman that spake lately, would have cleared the Matter. He gave you a Distinction between the Proceedings of *Westminster Hall* and the Court of Chancery. I am Ignorant of both. I desire to know, whether we are to go here by the Proceedings of *Westminster Hall*, or the Court of Chancery? If we are not tyed by those Rules, whether we may let our selves into any Evidence that will induce us to believe him Guilty or not Guilty. If we are tyed to those Rules that are observed in all Courts of Justice, where Tryals of Treason are had, this can be of no Validity. So I desire to know, whether we are to go according to the Proceedings of those Courts, or whether we may Proceed as the Court of Chancery?

Sir Thomas Littleton. The Honourable Member that spake last, desires to know, Whether we are bound by the Rules of *Westminster Hall*, in their Proceedings

ceedings or not? I believe it would have been to very little purpose to have thought of this Bill, if those Courts could have Convicted him. I believe if the Council had tyed you to the Proceedings of *Westminster Hall*, and thence have inferred that you could not have Proceeded on this Bill, you would have taken notice of them, and reprimanded them for saying so. I know not what to say to the Proceedings of Chancery in this Case; but I suppose upon this Tryal, you will inform your selves by the best Methods you can; and every Man, according to his Judgment, be for, or against this Bill. If upon what I hear, I am of Opinion, he is notoriously Guilty, I shall freely pass the Bill. If I do so much as doubt that he is Guilty, according to the old Rule, *Quod dubitas ne feceris*, I shall not be for it, and in Order to this, I am for hearing every body that comes before us. It is said, that possibly *Goodman* is withdrawn to Sir *John Fenwick's* prejudice, I would be glad to hear that, if so, I shall have the worse Opinion of the Bill. They say, 'tis not alledged in the Bill, concerning Captain *Porter's* being tampered with; but 'tis only alledged, That *Goodman* is withdrawn, and not that *Porter* was privy to it; but it may weigh in Gentlemens Judgments, how he comes to be withdrawn, They that tamper with one Witness, may be thought like to tamper with another. They tell you, That the Evidence of a Man's Wife will not weigh against her Husband. It may so in point of Law, but if you think your selves bound up to the strict Rules of Law, dispose of your Bill presently.

Sir *Will. Coryton*. You have been pleased to give leave to the King's Council to prove Matters against Sir *John Fenwick*: You have heard Captain *Porter* upon the Fact. If they had opened the Matters, that Sir *John Fenwick* was Instrumental to convey *Goodman* away, I should have been willing to have heard it: But they opened it, That my Lady *Fenwick*

wick was Instrumental in Conveying away *Goodman*, and this ought in no sort to be Admitted for Evidence in this Case. An Honourable Gentleman of the Long Robe made a difference in the Proceedings between the Court of Chancery, and the Courts of *Westminster Hall*: But I would fain know, if a Fact was controverted, Whether my Lord Keeper could determine the Matter before a Commission went to prove it. 'Tis true, we are not tyed to the Forms of Law, but we are tyed to the Forms of Justice. I know no Case where a Wife is Admitted to be a Witness for or against her Husband. In *Brown's* Case indeed, who took a Woman away, and forced her to Marry him, the Question was, Whether she should be Admitted? And in that Case she was Admitted as a Witness, because the Necessity of the thing required: and there was no other way to prove, whether he had her Consent or not. Another Case there was of my Lord *Castlehaven*, where from the Nature of the thing, it was Admitted; for it was impossible there should be any other Proof of it. But if my Lady *Fenwick* be Guilty of this Matter, it must only by way of Inference, affect Sir *John Fenwick*. They tell you, they Insist upon it as an inducement, then it comes to be a Matter of Consequence; and therefore since the Matter hath been fully stated to the House, as to what they would prove: I think we may now give our Judgment upon it.

Mr. *Boscawen*. You are here in your Legislative Power, and are no more tyed to the Rules of Law in Examining of Witnesses, than you are in giving of Judgment; for you can give those Punishments that never are given in *Westminster Hall*. I am of Opinion that my Lady *Fenwick* cannot be Examined for or against her Husband; but if he send her to Solicite for him, it shall have some weight with me. Those that don't believe it from what he says, may give their Judgment accordingly: I desire to know of this Gentleman, if I don't believe it, whether I

can

can give Judgment against him? I believe a Man's Conscience ought to go with his Judgment.

Mr. Speaker. I will Read the Question, *That Captain Porter be Examined to the Attempt of taking off his Testimony as to the late Conspiracy.*

Which Question being put, it passed in the Affirmative.

Mr. R. Harley. I suppose Sir you will let the Council of both sides have first done with their Questions; and then there will be some Questions proposed to you.

Mr. Howe. They tell you how that Sir John Fenwick was Indicted, and that Goodman is withdrawn; but there is one Thing the Council of both Sides slip over, and that is, Sir John Fenwick hath given in false Information. It looks as if they were agreed on both Sides in that Matter. I desire the King's Council may be asked, Whether they have any Evidence as to that particular?

Col. Crawford. Since I am mentioned in that Paper.—

Admiral Ruffel. I believe though that Gentleman was afraid that Matter would have been passed over, the Gentlemen of this House that are therein Named will take care, for their own Vindication, That that Matter should not be slipped over, I suppose the proper Time for that is, when the Evidence is over. I assure you, if no Body else will, I will.

Then Sir John Fenwick, and the Council of both Sides, and Captain Porter, were brought in.

Mr. Speaker. Sir Tho. Powys, The House hath considered of your Exception to the Testimony of Captain Porter, as to the Point he was to be Examined to, and they are agreed, That 'tis fit that all the Evidence should be laid before them, and they can judge afterwards, whether it be material or fit to be allowed, or not. Therefore, Captain Porter, Pray do you give the House an Account at large of what Attempts have been made upon you, at any Time,

to draw you off from your Testimony, with respect to the late Conspiracy.

Capt. Porter. I had a Meeting with one *Clancy*, first in *Mitre Court*, at *Mrs Moretons*, and afterwards at the *King's Head Tavern*, by the *Play-house* : At those Meetings he proposed to give me 300 *Guineas* to bear my Charges to *France*, and to send me a Bill for 300 more ; and likewise that I should be allowed 300 *l.* a Year.—

Mr. Speaker. How long had you been acquainted before?

Captain Porter. Several Years.

Mr. Speaker. Did he tell you who he came from?

Captain Porter. After the First meeting he told me he had been with *Sir John Fenwick*, who desired him to make this Proposal to me?

Mr. Speaker. How often had you Meetings with him.

Captain Porter. About Seven or Eight times.

Mr. Speaker. What Satisfaction did he give you, that *Sir John Fenwick* would perform the Agreement?

Captain Porter. He told me, my Lady *Fenwick*, and my Lady *Mongomery*, should meet and confirm every Thing that Night. The Day before I was to go, I met with my Lady *Fenwick*, who told me, my Lady *Mongomery* could not come, because one of her Children was fallen Sick.

Mr. Speaker. What Satisfaction did she give you, that *Sir John Fenwick* would perform what *Clancy* had proposed?

Captain Porter. She said, what *Clancy* had proposed should certainly be made good.

Mr. Sergeant Gould. Did you receive any Thing in part, in pursuance of this Agreement?

Captain Porter. I received 300 *Guineas* of *Clancy*, and he promised to me a Bill of 300 more, which he said was deposited in his Hands, to be sent after me into *France*.

Mr. Ser-

Mr. Sergeant Gould. Pray what Letter was that he brought you?

Captain Porter. He brought me a Letter, and said, it was writ by Sir John Fenwick to King James on my behalf.

Mr. Speaker. Did he deliver that to you?

Captain Porter. No: he delivered it to the Gentleman that was to go with me, one Captain Donegh.

Mr. Speaker. Why did you not take that Letter into your own Hands?

Captain Porter. I had it, and read it, before it was seal'd up.

Mr. Sergeant Gould. Do you remember the Contents of it?

Captain Porter. As much as I remember was, He desired his Majesty, by reason that my going away was to save my Lord Aylesbury, and my Lord Montgomery, &c to pardon what I had done.

Mr. Recorder. Who subscribed it?

Captain Porter. It was not Sir John Fenwick's Name, but they told me, King James would know who it came from.

Mr. Recorder. How did you proceed after the Meeting with my Lady Fenwick?

Captain Porter. The next Night after that he had paid me my Money, and shewed me the Bill, and I was to go away the next Day after. They said, the Boat was provided?

Mr. Recorder. Can you tell whether the Boat was provided?

Captain Porter. They were taken up presently after.

Mr. Sergeant Gould. We will now produce a Record to confirm the Evidence that he hath given you. This Person hath been convicted for this Tampering.

Accordingly the Record of Clancy's Conviction was produced.

Sir

• *Sir Thomas Powys.* I desire to know whether they offer this as Evidence against Sir *John Fenwick*.

• *Mr. Speaker.* They offer it to prove, That this very Person hath been tampered with, to take off his Testimony, and they leave it then to the House to judge, who is most likely to be Guilty of *Goodman's* withdrawing. They began to shew you, there hath been an Attempt to take off this Person's Testimony, you have heard the Person himself to it already. So now they offer to Read the Conviction of *Clancy* to this Matter.

• *The Record of Clancy's Conviction was read.*

• *Mr. Recorder.* We will prove the like Solicitation hath been made by *Mr. Dighton*, who is the Solicitor for the Prisoner at the Bar.

• *Mr. Speaker.* What is your Witnesses Name?

• *Mr. Recorder. The. Roe.* If you please, Sir, to ask him, what Endeavours have been used by *Mr. Dighton*, to make use of him, that *Goodman* might withdraw himself.

• *Mr. Speaker. Mr. Roe,* You are required to give this House an Account of what hath passed between *Mr. Dighton* and you, in order to take off the Testimony of *Mr. Goodman*.

• *Mr. Roe.* About the middle of September last I had occasion to go to *Mr. Dighton*, to enquire, where the Commissioners for the Land Tax in *Surrey*, sat; for I knew he was concerned in some Affairs of that County: He told me, He did not positively know, but would speedily enquire. At the same Time, he took occasion to tell me, He knew it was in my Power to do Sir *John Fenwick* Service. I asked him, What he meant by it? Says he, I know you know *Goodman* well, and it will be the Better for you, if you will tell me: I asked him, What he meant by that way of Talking? He desired I would meet him some other Time, and I should know further of his Mind, Accordingly I did Meet *Mr. Dighton*: Says he, You know *Goodman* well, and if you can say

any thing that can discredit *Goodman's* Testimony, you shall have 100*l.* a Year settled upon you for your Life. Says I, Sir, I do know him well. Says he, Did you never hear him talk of Poysoning the Duke of N. and Robbing on the High-way, and that he is concerned with Clippers? Says I, I have heard him talk of those Matters several Times, but you can't think I will be a Witness, and expose myself, and disparage People, till I know for what. Says he, for that you shall be satisfied; you shall have 100 *l.* a Year settled upon you, provided you can discredit *Goodman's* Testimony, that Sir *John Fenwick* may come off, and it will be done by a Friend of yours.

We accordingly agreed to meet the next day at a Coffee-House in the City, and appointed a Friend to be there, but Mr. *Dighton* did not meet at that time, and the Reason he told me, was, because Sir *John Fenwick* was that Day to be Arraigned. As soon as Mr. *Dighton* had made this Proposal, I told Mr. *Goodman* of it, and he advised me to go on with him, and see if I could get any offer under his Hand: I told him, he had appointed to meet me in the City, and a Friend to be there to hear me, I went, and told Mr. *Dighton*, but Mr. *Goodman* would not be satisfied with that, but said I must go to the Arch-Bishop and tell him what passed; so I did go and tell the Arch-Bishop what I have told you now.

Mr. *Speaker*. Had you any Meeting after that?

Mr. *Roe*. Yes, on the 19th of *September*, and then he made great Asseverations, that what he said should be performed; and that I should not only oblige Sir *John Fenwick*, but my Lord *Montgomery*, and that *Goodman* was a lost Man by being become a Common Evidence, and that it would not be in his Power to oblige any Man, my Lady *Duchess* having Discharged him of his Employ, and he would not be in a Condition to do further for me; and says he, whatever you would have gotten by serving my

my Lady Dutcheſs in her Concerns, ſhall be made up over and above this 100 *l.* a Year that I have promiſed.

Mr. Sergeant Gould. I deſire he may be asked, Whether *Goodman* did not acquaint him, that a Siſter of Sir *John Fenwick's* had been with him, and upon what Occaſion?

Mr. Roe. About the time of preferring of the Bill againſt Sir *John Fenwick*, I ſaw *Goodman* at *Hick's* Hall, and a little after, he told me, that a Siſter of Sir *John Fenwick's* had come to him, and made ſome Propoſals to him, and I acquainted the Duke of *Shrewsbury's* Deputy *Mr. Vernon*, with it.

Mr. Speaker. Did you purſue this Diſcourſe with *Mr. Dighton*, ſo as to come to any poſitive Agreement?

Mr. Roe. No otherwiſe than what I told you. My Deſign was to have *Mr. Dighton* to have given it me in Writing, or elſe for him to have ſaid it before ſome other Man. But I don't know any thing whereby I could have diſcredited *Mr. Goodman*, if he would have done it.

Mr. Sergeant Gould. You obſerve, Sir, that one of the Witneſſes whoſe Name is ſubſcribed to the Bill of Indictment, is withdrawn: Now to give you an Account that he is withdrawn, I deſire the King's Proclamation may be Read.

Members. No, no.

Mr. Recorder. We have *Mr. Goodman's* Examination under the Hand of *Mr. Vernon*. We pray it may be Read.

Sir Thomas Powys. *Mr. Speaker*, I deſire to be ſpared a Word to this Matter: I take this to be a great Point, not only as it concerns the Life of this Perſon, but as it may be a Matter of Example in all times hereafter. That which they would offer, is ſomething that *Mr. Goodman* hath Sworn, when he was Examined by *Mr. Vernon*; Sir *John Fenwick* not being preſent or privy, and no opportunity given to croſs

Examine

Examine the Person; and I conceive, that cannot be offered as Evidence; for if that should be allowed, then what is Sworn behind a Man's back, in any Case whatsoever, may as well be Produced as Evidence against him; and they know, that in a Case of the value of Five Shillings, no Depositions or Examinations of any Man can be made use of. I am sure they will not say, that the Depositions taken between other Persons, where a Man is not a Party, can be made use of as Evidence against him; and if not admitted, where Property is concerned in the lowest Degree, I hope you will never admit it in this Place, from whence Inferior Courts (as to Justice) take their Measures.

Sir *Partb. Shower*. Mr. *Speaker*, I desire you would spare me a Word of the same side. I humbly oppose the Reading of this Examination, as not agreeable to the Rules of Practice and Evidence, and that which is wholly new. In Civil Causes this can't possibly be done; no Deposition of a Person can be Read, though beyond Sea, unless in Cases where the Party it is to be read against was privy to the Examination, and might have cross Examined, or discredited the Witness. But in Criminal Cases, I Appeal to the Gentleman on the other side, who knows the Proceedings in the *Old-Baily* very well, Whether it was ever admitted as proof of Treason. Nay, in an Appeal of Murder, if Depositions be taken before the Coroner, or there be an Examination of Witnesses upon an Indictment, though the Appeal be for the same Fact, and in Order to bring the Person to the same Punishment, yet in that Case those Depositions can't be Read, because 'tis another suit: Tho' in many Cases the *Attorney General*, may for the King Arraign the Party, and Prosecute him, upon such Appeal where the Appellant declines it, and tho' the *Statute of P. and M.* direct in some Cases, that the *Coroner* and *Justices* shall return the Informations, and Examinations of the Witnesses, to the Ses-

sions, yet that is not for Evidence to be read, but in Order to inform the Court, and give their Judgment as to Bailment, and other like matters. 'Twas never allowed that the Examination of Witnesses behind a Man's back, should be Read in any place whatsoever. Our Law requires Persons to appear, and give their Testimony *Viva Voce*; and we see that their Testimony appears Credible, or not, by their very Countenances, and Gestures, and the manner of their Delivery; and their Falsity may sometimes be discovered by Questions that the Party may ask them, and by Examining them to particular Circumstances, which may lay open the Falsity of a well laid Scheme; which otherwise without a nice sifting of them might have passed for good Evidence, and this great Advantage we are deprived of, if this Examination should be admitted to be Read.

Now, though the Practice of other Courts does not oblige this Honourable House, yet we know you will Consider the Rules of Justice; 'tis but Justice in Criminal Cases, especially as our Constitution is, that the Person should see his Accuser. A Man may Swear to a Deposition reduced into Writing, whose Conscience or fear of being falsified, perhaps would not let him Publickly Accuse the Prisoner, Face to Face: Experience hath shewed it often, that several that will Calumniate another Privately, will not justify the same in an open Court. What *Goodman* is, 'tis not proper for us at present to give an Account of, but we oppose it at present, for that we were not Present, nor Privy, nor could have cross Examined him; What is desired to be produced is, only an Information before a Private Justice; and then if so, Mr. Recorder knows, that in the *Old Baily*, if *Goodman* had died, it had not been Evidence: In case he had been Sick, or withdrawn without our Privy, they could not have Read it: Nay, if he were withdrawn by our Privy, it could not be Read there. 'Tis true, the enticing him to withdraw, had been punishable

ble in the Person attempting it, but could not have been Read to have Convicted the Party ; and since this Examination could never have been Read there ; because not consistent with the general Rules of Justice, I hope you will not admit it here.

Mr. *Speaker*, Mr. *Sergeant Gould*, what do you say to it ?

Mr. *Serg. Gould*. I observe this Gentleman's Objection, why this Examination should not be Read ; and under favour, we think we are Regular, as this Case is, to have his Deposition Read. 'Tis true, as long as the Witness can be produced in all Courts, and Practice of the Law, you shall not Read his Examination, or what is taken before a Justice of Peace ; But that is not our Case. It is now fully proved before you, that he is withdrawn, and 'tis fully before you, that he hath given Evidence for the King, and hath been Examined, and this is an Extraordinary Case, and that is the reason we are in Parliament. He hath Sworn this Matter, and before a proper Officer, Why then shall not his Evidence be Read and Allowed, when he is wilfully withdrawn, and we say, by the Contrivance of the Prisoner at the Bar. And the thing speaks it self. Now, with Submission, I take it to be every Days Practice, that where a Witness is Dead, his Depositions shall be Read. It appears to you, that there was to have been a Tryal, but the Witness is withdrawn, and it appears plainly, that there hath been tampering. The Evidence is full, in the Case as to *Porter* ; and we have produced a Record of Conviction, that does confirm it : Now this is such a Practice, we come into Parliament to have it remedied ; for otherwise Men shall commit Treason, and by their Contrivance and Art, the Witnesses shall be drawn away, and the Person shall not be brought to Condign Punishment. Here is the Record upon which he gave Evidence, but since he is withdrawn ; And therefore I hope, in this Case, we shall be admitted to Read his Deposition, for I deny

what the Gentleman says, to be Practice. And Mr. Recorder can give you a better Account, who knows more of the Practice of it, That if a Witness is dead, they may Read his Examination. We are here before you in Parliament, and by the same Reasons that others have been tampered with, this Witness may be presumed to have been tampered with. And therefore we are in your Judgment, whether in this Case his deposition shall not be Read?

Mr. Recorder. 'Tis Objected, on the other side, That this Evidence ought not to be offered, and for what Reason? Because, say they, a Jury ought to go *Secundum Allegata & probata*; and what is not strictly Evidence by Law, you are not to take notice of; but in Criminal Cases (which is this Case) where Persons do stand upon their Lives, Accused for Crimes, if it appears to the Court, That the Prisoner hath by Fraudulent and Indirect Means, procured a Person that hath given Information against him to a proper Magistrate, to withdraw himself, so that his Evidence can't be had in Person in that Case, his Information hath been Read. Which, I suppose, with humble Submission, is this Case. But I suppose, we are not here tyed up to Formal Evidence. But 'tis our Duty, since the House hath Commanded to lay the whole Fact before you to offer this, and you are Judges what is Material, and what is not Material.

Sir Tho. Powys. Please, Sir, to spare me a little; for sure this is no small matter. I did expect that they, if they had intended to have supported this Evidence, would have mentioned some Author, some Case, or some Precedent where this has been done before: — But he makes such a Distinction, I am mightily surprized at; for Mr. Recorder cites no one Instance, that ever he saw such a thing in his Life, nor cites one Book that hath such Authority; but he gives you a Distinction, whether it be of his side or ours, I must submit to you; for he seems to Agree, that in Cases of Property, such Evidence is not allowed;

allowed ; but in cases of Life, in which we ought to be more tender, he says, 'tis to be allowed. Sure, if it be not Evidence where Five Shillings only may be at Stake, I submit it to you, whether it ought to be admitted in the Case of Life ? For my part, I know nothing of it, if it be a Rule ; but I always thought the Evidence ought to be more Clear and Full in the Case of Life, than in the Case of Property ; but Mr. Recorder turns it upon us, and says, Though it is not Evidence in Case where Property is concerned, 'tis Evidence in Case of Life : But I desire he will shew any one Lawyer in England, that ever said it but himself.

Sir Barth. Shower. I Answer to what Mr. Sergeant Gould says, That this is an extraordinary Case : How far 'tis so I will not take upon me to say ; But oppose it in respect of the Rules of common Justice. As to Mr. Recorder's Distinction between Civil and Criminal Causes ; he hath admitted, that in Civil Causes it would not be allowed ; and I hope you will be of Opinion, that it ought not to be admitted in Criminal. He says in Criminal Causes, The Jury must go *Secundum allegata & probata*, I desire to know what other Rules a Jury hath in Criminal Cases ? Will they say, that a Jury-Man is not as much upon his Oath in Trying a Prisoner for his Life, as in Trying an Action of Trespas ? Is not the Oath, *You shall well and truly try, &c. according to your Evidence* ? Now, I would know whether the Form of the Oath, which the Wisdom of our Ancestors have thought fit to use for 1000 Years past, be not the most proper direction to inform us what shall be Evidence ? Evidence *Prima Facie* must be Evidence of Living Persons : I am speaking for the Life of a Man, and for maintaining the Rules of Law, which I hope shall continue for ever, and one of those Rules is, That the Examination of a Person that is absent, shall not be Read to supply his Testimony. What you shall think fit to do here, we must submit to ; but that 'tis allowed below, we must deny.

Mr. *Serg. Lovel.* Sir I do, with humble Submission, stand to what I said, As to the Definition of *Allegata & probata*, in matter of Property, we agree with them; but as to *Allegata & probata*, in matters Criminal, we must differ with them. I did say it before, and do say it again, with Submission, That in many Cases Criminal, there need no positive Evidence at all, and yet the Jury according to *Allegata & probata*, in that Case, may Convict a Criminal. And I do say with Submission, That where there is no positive Proof at all, many Criminals are, and still will be Convicted. I did Instance before in the Case of Clipping and Coining; which are Matters so secretly Practised, as 'tis very rare, there can be any positive Witness to prove the Fact, What is then the Method? Why we go by Circumstances, by Information of other Persons, by Tools, and other Instruments that are found; and though no body ever see them do the thing, yet they are Convicted. We do not offer this Evidence to be as concluding Evidence, as if *Goodman* was here; but as Corroborating Evidence of what Captain *Porter* hath said. If it did wholly depend upon this Evidence, it may be it might have no great weight; but since there is other Evidence *Viva Voce*, and since you have been pleased to Order us to lay before you all the Evidence, we humbly offer it to you, and pray it may be Read:

Mr. *Manley.* I humbly pray they may withdraw:

Mr. *Speak.* If you please, to withdraw. But first I am required to ask, if on both sides you insist upon this Point?

And the Counsel for both sides Declared, they insisted on it. And then withdrew.

Mr. *Manley.* I should not have presumed to have given you this trouble of their withdrawing, but that a thing is insisted on by the Counsel for the Bill, which I think is of the greatest Consequence to all the Freemen of *England*. 'Tis true the Rules of

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Westminster Hall are not binding to the Legislative Power ; but I would not have the Legislative Power to be governed by the private Sense of any Man whatsoever, but by those Rules that are the Rules of Justice and Common Equity. God forbid that we should, upon Suppositions, suppose our selves out of all the Rights of the Law. I never heard any Gentleman of the Long Robe, before the Learned Sergeant at the Bar, assert, That an Examination before a Justice of Peace, could be read against a Man for his Life. 'Tis known to all that have look'd into the *A B C.* of the Law, that it was never Practised. 'Tis true, in Equity, Depositions may be read, because they are taken by the Consent of all Parties ; and 'tis as well a Deposition of one side, as of the other, and the Witnesses may be cross examined. But that is nothing to this Purpose.

Mr. Sloane. I believe I may save you a great deal of trouble in this Matter ; for those Gentlemen from the Bar that made Objections, speak without Book, but I speak by Book ; No less a Man than my Lord Chief Justice *Hales* (and I think he was past his *A B C.* of the Law ; I know not how far this Gentleman is advanced) in his Pleas of the Crown, in that part where he shews what is Evidence to the Petit-Jury, He says,

Having my Lord Chief Justice Hale's Pleas of the Crown in his Hand.

First, By the Statute 1 & 2 *Phil. & Mary. c. 13. 2 & 3 Philip & Mary. c. 12.* The Justice hath Power to Examine the Offender, and Informer, and so he goes on in several particulars: And then 5. He says, *these Examinations, if the Party be dead or absent, may be given in Evidence.* I must allow, such an Examination not of the same Authority as if the Witness was present it would be, because he can't be cross Examined, but still it is of some Weight, and it must be read. But in this Case, 'tis of greater weight than in that which my Lord Chief Justice puts ; for he says, it would

would be Evidence, if the Party was dead, or if he was withdrawn without the Consent of the Party against whom he is a Witness, and that comes to the Case in Chancery, every day practised; That if any Person gets my Deeds and Evidences into his Hands, and he hath Imbezled the Deeds, they shall be presumed to be what I alledged, because 'tis his Fault he does not produce them. So this withdrawing by the Instigation of *Sir John Fenwick*, is a strong Presumption, that what he Swears against *Sir John Fenwick*, is true.

Sir Rich. Temple. No man can give Evidence of any Depositions, nor was it ever admitted to be Evidence either upon the Party's Death or Absence; and I would not have that Doctrine pass, that We are not tyed to the Rules of Law. My Lord Chief Justice *Vaughan*, when he was of this House, told us, we were not bound to the Forms of Law, but we were tyed to the Rules of Law; and if you are not, How will you judge of this Crime? How will you judge it to be Treason. In the worst of Times, in the Tryal of my Lord *Mordant*, who was Tried before the High Court of Justice, they would not allow of this piece of Evidence, tho' they had thrown aside Juries. We are tyed by the Rules of Law, or we are tyed by nothing.

Sir Tho. Littleton. The Worthy Member here tells us, We are tyed by the Rules of Law, or we are tyed by nothing. I hope he does not intend to put the Pun upon us, that was by a Noble Lord. You are tyed by Rules or no Rules; if you are tyed by no Rules, What Rules are you tyed by? I think you may act by Rules, and yet Admit of this Evidence. I told you before, I should not reckon my self so tyed by the Rules of Law, but that I would hear all Evidence that should be offer'd; and I do not think 'tis for our Honour to stifle any thing that may bring out the Truth. A worthy Lawyer said, Let them produce one Evidence that is of the

Recorder

Recorder's Opinion ; and a Member hath produced the Opinion of my Lord Chief Justice *Hales* : And I hope we shall not be debarr'd from the Satisfaction of Hearing what they might hear in the Courts below. Here are two Witnesses that have been examined against him, which the Jury did believe that found the Bill. If we can't have these two Witnesses, let us have as much as we can. We have heard what one said : We have an opportunity of knowing what the other said. No, says the Gentlemen, We do not desire to be Inform'd, but I believe it must come to that at last.

Sir Rich. Temple The Gentleman that spake last, insinuated, as if I had dropp'd something he could not understand. Give me leave to tell you, There was the Court of the President of *Wales*, when they tyed Rules of Law, then they were a Court of Equity ; and when they Argued from Points of Equity, then they were tyed up by the Rules of Law. And so gave Judgment neither according to the one nor the other, and so it was taken away by Act of Parliament.

Mr. Boscarven. I have seen it my self, that a Justice of Peace has been examined himself, as to Depositions he had taken, and I take it to be an ordinary Examination.

Mr. Harcourt. Sir, I must say, if you were to pick all the Absurdities out of the Tryals in the late Reigns, you could not pick out more than have been endeavoured by the King's Counsel to be imposed upon you this Day : This does in some measure convince me, of what was said by another Gentleman the other day, That it is much better to be tryed by an Assembly of 400 Gentlemen, than at the *Old-Baily*. There was a Quotation of a Learned Author, and the Gentleman read you what was Evidence, and what was not. And the Conclusion was, That these Depositions, if the Party was Dead or Absent, is Evidence. Why Sir, if these Depositions be Evidence

dence if the Party be Absent ; then what are we doing of ? If that be a certain Rule, there is no manner of need of Applying in this Extraordinary way ; but if you please to enter into the Consideration of what is proposed to you for Evidence (I am neither afraid, nor unwilling to be informed.) If Gentlemen will take it, *De bene esse*, For better or worse, with all my Heart ; I will freely tell you my Opinion of it.

Sir Edw. Seymour. It hath been made a Question, How far you are bound to pursue the Rules of Law ? I suppose it is no new Thing I am a going to say, That Bills of Attainder, and Judgments of Attainder, have been reversed for no other Reason, but because the Parliament have not proceeded according to the Rules of Law. I will not say, you are bound, by the Rules of inferior Courts, but you must be bound by the Rules of Parliament, and by the Proceedings and Practice of Parliaments, which is the Law of Parliament. And then I would know, whether ever this House did admit of an Affidavit for Evidence ? And the reason is this, because by that you make this, which is the superior Court, lame, without the Assistance of an inferior Court.

Mr. Geo. Rodney Bridges. The Matter before you is, Whether Sir *John Fenwick* be Guilty, in your Judgments, of this Conspiracy ? And if so, I can't imagine why you should not take all the Information that is offered to you, and not hear all the Circumstances of it. If you do not read this Affidavit, I do not say but 'tis a kindness to Sir *John Fenwick*, but what kindness will it be to the Country and Government ?

Mr. James Montague. I hope you will not spend much more time about this, because the Law is so plain : If there be any Thing in the Objection, 'tis this, That if it be Evidence, the Courts below may proceed upon it : But that I take to be no Objection neither ; for though it is Evidence, there are not

not two Witnesses, and the Courts below require two Witnesses, so though there be this Evidence, and one Witness besides, yet you can't try him for Treason in *Westminster-Hall* without two Witnesses. It would be admitted in the Case of Felony, and would be sufficient where two Witnesses are not required expressly by the Law. And I can tell you, upon my Reputation, I have seen it done several times. The Learned Gentleman tells you that my Lord Chief Justice *Hales's* Opinion is so, and that is grounded upon an Act of Parliament, and I think that is of greater Authority than any Judge's Opinion, and therefore I think that Objection will vanish. The Honourable Gentleman at the Bar says, You have no Authority to receive Affidavits, but sure we may take Notice of Acts of Parliament; and if that requires Depositions to be taken, and to be certified to the next Sessions and in order to be Evidence against Criminals, we ought to take Notice of it, so that what the Law makes to be Evidence will be good in this Place.

Mr. Harley. I look upon this Matter under your Debates to be of the greatest Consequence to the Lives of the Subjects of *England*, that possibly can come before you: Gentlemen have given you several Reasons for reading these Depositions; one, that it was my Lord Chief Justice *Hales's* Opinion; another, that there is an Act of Parliament for it: Now, I think, it would be proper to join Issue in these two Points, If any Act of Parliament can be produced for this, then the Debate will be at an end; but if there be an Act positive against it, then I hope you will not receive it: And if my Lord Chief Justice *Hales's* Book, have not one Word relating to this, then I hope that will be no Argument. He begins his Chapter of *Evidence*, and says, That the Evidence to the Jury, in Cases of Treason, must be two Witnesses; and then comes to the Cases of Felony: But is that any Debate before us? And he tells you,
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That Informations might be taken of the Person himself, but that was not by the Common Law, but was allowed of by particular Acts of Parliament; and then tells you, That his Information, and Depositions before the Justice, were to be admitted, (but he was to be by :) But is this any Thing to lead you? Have they brought any Statute that tells you, there must not be two Witnesses in this Case? If you will take notice of a Statute, you must take Notice of a Statute, that is in point. If any Man suffers by one Witness, I believe all the World must say, he suffers unjustly: I think 'tis of the greatest Consequence to admit of Affidavits. Here it is, that the Boundaries are established for the Lives and Liberties of Mankind: And this is an Observation that is found in History, That those that have broke their Bounds down, it hath returned upon them to their Prejudice. Let us not out of hatred or Zeal against a Gully Man, lose our own Innocence.

Sir Rob. Rich. I am sure now we are not upon the Point of Reading, whether it be much or little, but upon the Point of Hearing, and that I spake to. And, I think, the Gentleman near the Table, did not mistake what the Bar said; for the Counsel on the other side insisted positively, That neither by the Practice, nor by the Books, was a Deposition to be read as Evidence: Against that, the Gentleman near the Chair produced that Book. As to the matter of Treason, every Parliament Man can remember, that you have made an Act, That there shall be two Witnesses in Cases of Treason. Now, at the same time, it will be taken Notice of, that you have taken Care in that Act, That the Proceedings of this House shall not be tyed up by it. The Gentleman tells you, of a Court that wavered between Law and Equity, and so came to nothing, and I am afraid, if we bring the House of Commons down to the Courts of *Westminster-Hall*, they will make nothing

thing of us neither : I do not say, That this Paper shall be as strong Evidence as if *Guilman* was at the Bar, but to say, it shall weigh nothing, I can't agree neither. I agree also to make a common Practice of reading Affidavits, will be of ill Consequence ; And if you take this to be a matter of small Consequence, I am not for reading this Affidavit now. I aim not at Sir *John Fenwick's* Blood, but the safety of the King and Government. And I would not refuse any Evidence in this Case, be it never so small. These Gentlemen speak against a matter being Evidence before it is read, 'tis offered as Evidence, if it be small, or come to nothing, it is the better for the Prisoner at the Bar.

Mr. Pelham. I am indifferent whether I hear that Paper read, or no, but what is said by a Learned Gentleman startles me ; says he, In *Westminster-Hall* they are bound to the Evidence of two Witnesses, and there this Evidence would not be proper, but here we are upon another Foot. I hope we are not here upon another Foot, though here, we are not to be tryed by the *Chicanry* of the Law, we are to be tryed by the Equity and Substantial part of it. I desire to know, if any one can be tryed for Treason upon one Witness ? And if we are not tyed by the Rules of Law, we may as well say we may hear any Evidence whatsoever, and if the King's Counsel thinks it may satisfy your Fancies, it must be received.

Lord Cutts. I conceive, Gentlemen, we are out in the way of Arguing. I must put you in mind that we are at the Bottom, only arguing against the Jurisdiction of this House ; and though that Matter hath been settled before, we are told very often of the Law, and Rules of *Westminster-Hall*. In answer to that, I must observe there are several Sorts of Laws, there is the Law of Nature, the Law of Nations, the Law of God, and there is the Legislature, and 'tis a Self-evident Maxim not to be contradicted,
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That no Superiour is to be Circumscribed by an Inferior. And I would ask, If the Courts below are not inferior to the Parliament? There is nothing can Limit us, but the Law of Nature, the Law of God, and the Law of Parliaments; and though I cannot tell you very well what is the Law of Parliaments, yet no Gentleman hath said any thing upon that Subject, that is, against the Question before you. The Matter was in a Course of Law, but upon an extraordinary Accident, and for extraordinary Reasons, 'tis brought before you. The Accident is the withdrawing of a Witness, the Reason is the Securing of the King, the Government, your Selves. and Posterity. I don't think any Man that hath spoke against it, is for favouring Sir *John Fenwick*, for I think this is the worst way. I would appeal to every Man, what Prejudice 'tis to you to hear this Paper read. And it may be a Disadvantage not to hear it.

Mr. *J. Howe*. There have been many Arguments given for and against the Reading of this Paper, and if I did not think that the Reading of it could be of no use to the Judgment we are about to make, I should be for the Reading; Either it amounts to a proof of *High Treason* against Sir *John Fenwick*, or it signifies nothing to you. If it be intended to weigh any thing, I can never agree to the Reading of it; for it is only a Hear-Say, brought to Convict a Man that is tryed for his Life. But there has been one thing often urg'd which seems to weigh more than all the Reasons offer'd; and that is, your Enemies will have an Advantage, and your Government is at Stake; I don't take that to be so much an Argument of the Strength of the one, as of the Weakness and neglect of the other. But however we sit not here to Patch the failings of the one, by an unwarrantable prosecution against the others. As to Sir *John Fenwick*, though he should not be a good English Man, yet his Cause may be the Cause of a good English Man. The Question is, *Whether there be more Danger*

to the Government, by the withdrawing of a Witness, and the Escaping of Sir John Fenwick, or to us and our posterity, by the withdrawing of a Witness, and the Convicting of Sir John Fenwick for that Reason. They give Goodman his full freedom, he is gone, and now they pretend, the Fate of the Government to depend upon his Testimony. The Precedent is not much to be feared; for, I suppose future Governments will take Care, if they think fit to use, at least not to let such a Witness go about the Streets at Liberty. But it may happen, that certain Men, (for asserting the Liberties of their Country in this House) may be Run upon by ill Governments, and attempts made upon their Lives by false Witnesses. Indeed the Bill of Treason provides, That no Person shall be condemn'd without two Witnesses. We all know two indifferent ones will serve a Grand Jury, nothing is so easie as to get a Bill found by them; yet nevertheless before a Petit Jury, one of these Witnesses may be so notoriously Infamous, as not to be fit to be produc'd; The only way to hang the Person so prosecuted will be then to Convey that Witness away, and urge this Precedent for a Bill of Attainder: A most dangerous one it is, and such a one as I think it is the Interest as well as Duty of all true *English* Men to oppose.

Mr. Smith. I think we are come to the Debate of the Bill, Instead of Reading this Paper. Was the Question, *Whether this Paper should be allowed as a second Witness?* then it would be a great Question with me, *Whether it should be Read?* But the Question, as to Colonel Sidney, was not *whether the Paper should be Read, But whether it should supply the place of a second Witness?* Your Debate is Extraordinary; your Bill takes notice of Goodman being gone away, and now you won't take notice of what he hath left behind him, which I should the rather be satisfied in, because I saw a Gentleman Soliciting at the Bar, that did endeavour to get him away. If Goodman had been brought a Prisoner to the Bar, I do not know,

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whether that might not have been reckoned as great a fault, as now his having too much Liberty. It hath been cited as a great Lawyer's Opinion, That his Examination might be given in Evidence ; but he does not say what weight shall be laid upon it.

Mr. Pelham. I am sorry that Honourable Gentleman mistook me so much, I thought I had spoke very plain, I told you, I was not against Reading of that Paper, till the Learned Gentleman told you, You were not tyed up as the Courts of *Westminster Hall*, to two Witnesses. As to what I said of Mr. *Sidney's* Case, it was not against Reading that Paper, but I said, he did rely upon it as against Common Justice, to be Attainted by one Witness (And that Attainder you have thought fit to Reverse.) And the Reason he gives for it, was, because it was impossible for a Man to make any Defence against one single Witness.

Mr. Att. Gen. The Matter you are now Debating upon, is, Whether these Papers should be now Read. And Gentlemen have let themselves into a Debate foreign to the Question. A great many are against it upon this Argument, that they would not be of Opinion to Condemn him, unless there were two Witnesses : That is not now the Question, for I think no Man is ready to give his Opinion to Condemn or Acquit him. One Gentleman is against the Reading of it, and yet believes Sir *John Fenwick* Guilty. I must respite my Judgment, till I have heard his Defence. I think that the Counsel for Sir *John Fenwick* at the Bar, are very much mistaken, when they said, That such a Thing as an Examination in Writing, was never Read in any Court of Justice, I think that is a great mistake, and a good Authority hath been Cited for it, and every one knows the Practice is otherwise. 'Tis often allowed, That the Examinations before a Justice of Peace are Read. The Question is now, *Whether this Examination shall be Read?* If there do not appear another Witness to prove him Guilty, you will Debate that Matter then, Whether
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you will Condemn him without two Witnesses ? You might as well have Debated before, Whether *Porter* should be Examined, because no Man will Condemn him without two Witnesses, and therefore do not Examine one. Why, we know not what further Witnesses may be produced. If Sir *John Fenwick* was upon Tryal, I think this Information might have been Admitted for Proof, if *Goodman* was out of the way ; but if it was Admitted, unless there was another Witness produced, I believe the Court would tell the Jury, Here are not two Witnesses, and therefore you must Acquit him.

Sir *W. Coryton*. I must crave leave to differ from that Worthy Gentleman ; I think this is the proper time to Determin, Whether this Evidence is to be admitted. Afterwards indeed you may determin, how far 'tis available. I thought, both in Law and Justice, before I came into the House, That this ought not to be admitted for Evidence. A Gentleman grounded his Argument ; upon what ? My Lord Chief Justice *Hales's* Opinion ; but the Fact is, that my Lord Chief Justice *Hales* States the Difference in Cases of Treason, and in Cases of Felony. Now in Felony, they make use of Depositions ; and the Reason is, because 'tis more for the Advantage of the Prisoner than his Disadvantage ; for if the Witness differ from his Examination before the Justice of Peace, that turns to the Advantage of the Prisoner. In the Nature of the thing, It seems not to be Reasonable, for it is easie to turn the Tables. And suppose *Goodman*, in the place of Sir *John Fenwick*, and Sir *John Fenwick* in place of *Goodman* ; it would be hard (take the Informations to be as they are) to Admit them for Evidence ; which in my Opinion, are great Reflections upon Persons of great Honour and Worth.

Sir *Chr. Mulgrave*. That which I conceive to be your Debate is that upon which the Counsel withdrew ; You heard it asserted, That there was no Instance in a Criminal Case, where an Affidavit was

allowed for Evidence: And I think the Learned Counsel at the Bar, did not much insist upon it, and yet I don't think they were Ignorant of the Case quoted out of my Lord Chief Justice *Hales*, but I suppose they thought it was not applicable to this Business before the House. But only related to Felonies, and when Depositions were taken in the Presence of the Party. 'Tis said, we are not tyed up to the Rules of *Westminster Hall*, and that Parliaments may Denominate Crimes after they are Committed; but I never did hear that the Parliament did take upon them to Determin that to be Evidence which is not Evidence in any Court in the World. If you Read this Paper to inform your selves, you Admit that to be Evidence, which is no where else to be Admitted. You are told, you are not tyed to the Rules of inferior Courts of Law, nor Equity, If you are not bound by them, you are bound by your own Constitutions. You are told, you are not used to Read Affidavits in Common Cases, but if my Memory serves me right, you have always had it opposed in this House. Therefore I think, according to the Rules of your own House, we should not Read Affidavits. Will you make a new Rule in this Case? Pray consider the Consequence of it hereafter. Suppose there come down Affidavits upon another occasion, against a Great Man for High Treason, Whether that may not be thought sufficient for to Govern your Judgments? I hope those that hear me, will have a Care of that Matter. Why, by the Parity of Reason, may not two Affidavits do by the help of the Legislative Power? I would be glad to know, whether in the Case of an Impeachment, any ever heard of Affidavits being Read? And this is much in that Nature. And therefore, why should you admit of an Affidavit now, when the Party Charged was not present, when that Affidavit was taken?

Sir *Jos. Williamson*. I am sorry this Point costs us so much time. The Gentleman that spake last, hath brought

brought us to the Question, How far you will admit this Affidavit (as they call it) to be Read. I am of Opinion notwithstanding all that hath been suggested, that it not only may be Read, but that it ought to be Read. None of the Cases that have been Instanced, comes up to the Case in Question. All the Cases that are brought, are from inferior Courts, and the last that is brought, is from the Example and Usage, in less considerable Cases, and indeed of a different Nature.

This Bill of Attainder, is a thing so extraordinary (as hath been said) as it never ought to be used but upon extraordinary Occasions, and upon that Principle, all that is feared is all answered and avoided. It is to be thought never to be made use of, but upon the like Occasion, and then God forbid, but we should be Governed by the like Precedent; and if that was proper to speak now, which will be, when we come to give Judgment, and we have time to consider of it, I can't think we shall differ in many Voices. Whether it be Evidence, and how far it is so, is not now the Question, but the Question is only, *Whether it be such an Evidence as ought to be Read?* And all the inconveniences that have been alledged, depend only upon this, that it should not be admitted in the ordinary Proceedings in the Courts of Justice. Now I say, there was a Power lodged in the Parliament of *England*, to make a Man Guilty of Treason, that was not so before, and that even in a Reign, when they came to Determine what Treasons were. They did not think it for the safety of the Community of Mankind, but that there should be a Power lodged in the whole, to Declare that to be a Crime, that was no Crime before it was Committed, giving them more than is asked here: For here can be no Question, but as to the Forms of Proceedings. The Question is not upon his Crime, that is no Question; and I take it, that if upon any Occasion, 'tis to be justify'd in this, and the Law

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hath trusted the Parliament with a greater Power than now they are about to Execute, and there are only Objections to it raised from another place, which I think can never conclude in this.

Mr. *Chanc. of the Exchequer*. I am for Reading of this paper, though I don't think it Evidence equivalent with *Viva Voce*; nor do I think, that in like Cases it ought to be Admitted below. But I think, in your Proceedings in Parliament, it ought to be Read, whether it be an Affidavit or not. And I am the more of that Opinion, from what happened in a Case to Day. We had a Dispute, Whether *Porter* was to be Examined, because the Testimony of a Man's Wife, was not good below? But when that came to be Examined, it was not the Testimony of a Man's Wife, but his own Letter appeared in Evidence; and *Clancy* told *Porter*, he came from *Fenwick* himself; and therefore the Evidence which at first, for that Reason, was urged not to be Heard, did amount to more when it came to the Proof. I would have this Paper Read, not because it should supply the place of a Witness. No, but because you see he hath been Indicted by the Evidence of *Goodman* and *Porter*, and the first is withdrawn, and by whose Means you have heard, and I would know, Whether *Goodman's* Evidence did amount to Accuse him of the same? I do say, in your Power of Judging, you are not constrain'd to the Rules of *Westminster Hall*. And I would say, that for your Constitution, the Courts of *Westminster Hall*, are to be Governed by the Letter of the Law; but there is lodged in the Legislative, a Power to judge those Crimes that are sheltered behind the Law. And I believe if the several Attainders were Examined, there was never any Attainder that went upon a more just Proceeding than this. I take the Crime to be a Plot with your Enemies, to bring in a foreign Power, and as if that was not sufficient, he hath made a False and Scandalous Confession, to bring a Distrust

struft and Jealouſie between the King and his People, and he hath dallied and gain'd ſo much time, as he hath had an Opportunity to corrupt one of the Witneſſes, and therefore it would be hard, if no Law ſhould reach him 'Tis ſaid, Why did not you keep the Witneſs? It would be hard, after a Perſon hath made a Confeſſion for the good of the Kingdom, that he ſhould be always kept in Irons. We are debating of the Bill, while we are now only, purely to ſee what is in this Paper. I ſhould not if read, have made uſe of this as a ſecond Witneſs, but the being an Affidavit or not, is not material in this Point? The Commons proceed upon Impeachments, without Affidavits. 'Tis offered as Evidence, That *Goodman* was a Witneſs againſt him (you have had proof of;) and that he hath been Tampered with, to withdraw, by the Friends of this Gentleman. I do think we have gone more fairly and equally to work, than upon any of the Records of Attainders in your Journals.

Mr. *Brotherton*. The Queſtion is, Whether this Paper ſhall be Read? Firſt, it hath not been proved before whom it was taken, nor nothing at all. It hath been objected, That there ought to be two Witneſſes, by the late Statute. But I muſt put you in mind, that it was ſo by the Statute of *Edward VI.* and ſo was the Common Law before; and my Lord *Coke* ſays, there muſt be two Witneſſes, and they brought face to face, and ſo goes to the Divine Law; And if it ſhould not be ſo, I will put you in mind of an Inconveniency. Eleven Witneſſes were produc'd before a Grand Jury, and when they came to give Evidence, face to face, before the Petit Jury, the firſt Witneſs did not know the Criminal that he had Sworn againſt. It was in the Caſe of Sir *Rowland Stanly*.

They mention a Paper againſt *Algernoon Sidney*; but that Paper was wrote by himſelf. 'Tis ſaid, this Houſe are not bound by the Rules of other Courts; for that Reaſon, they ought to give Rules to other

Courts. Nothing is more common, than to say Judgment was so in the House of Lords, and that settles the Law in other Courts below.

Sir Godfrey Copley. Several Gentlemen have spoke to the Reading of this Paper; which I cannot agree to, some have said. That it should be Read as Evidence; others are for the Reading of it, and at the same time tell us, it is not to be looked upon as Evidence, at least not Equivalent to a Witness: If the Paper is to be Read, I would know for what Reason, for if it be not intended to Sway or incline our Judgments, then I take the Reading of it to be of no use at all; But on the other hand if it is designed as a Motive to sway me, then I say it comes in as additional Evidence, and to supply the defect of another Witness, and the dangerous Consequence of such a Precedent deserves your Consideration.

I do very well understand that the Court of Parliament takes no Precedent from *Westminster Hall*. Nor am I much afraid of any Precedent they should give to *Westminster Hall*, but it is very natural to suppose that one Parliament may take Precedents from another, and therefore I am afraid this should be a Precedent to future Parliaments; Give me leave to suppose that any malicious Knave should hereafter Start up and Swear Treason against any of those Honourable Persons who are accused in Sir *John Fenwick's* Paper, might not that very Paper according to our Method of Proceeding, be turned into Evidence, and made use of instead of a second Witness, to convict them though never so Innocent?

Sir H. Hobart. I must differ with the Gentleman that spake last. As to the Gentleman that spake before, I did not expect any thing to be quoted out of *Lancashire* against the Reading of it. I will tell you why I think this Paper should be Read; you have it suggested in the Bill that *Goodman* was one of the Evidence against Sir *John Fenwick*; they are to make good the Suggestions, and this will shew,
That

That *Goodman* was an Evidence. You are told the Danger of the Precedent, and there may come ill Reigns, and ill Parliaments; as to that, I shall only say, in a good Reign, and a good Parliament, there is no Danger; and in an ill Reign, and in an ill Parliament, they will make Precedents without your giving of them. Mr. *St. John* tells you in his Arguments, 'Tis true in inferior Courts, by the Statute of *Edward* the VI. they are bound by two Evidences *Viva Voce*; but you are not prescribed by that here, but you are to Judge in your own Consciences as the Thing appears: I may say as another did upon another Occasion, Let it be Read; *Valeat quantum valere potest*.

Sir *Marm. Wyvell*. I desire to take notice of one Argument, that hath been made use of by one or two Honourable Persons; which is, They tell us, that *Goodman* hath been tampered with by Sir *John Finwick*: I remember no such thing that hath been proved; but indeed it was said, That Mr. *Dighton* offered Mr. *Roe*. 100*l*. a Year, to invalidate Mr. *Goodman's* Testimony.

Ld. *Castleton*. Let me ask you this Question, Whether if you Read this Affidavit you Read it as Evidence?

Mr. *Sol. Gen*. I desire you will consider what you did before. You Ordered Captain *Porter* to go on with his Evidence, and did agree you would consider of it afterwards, whether it was Evidence or not. Some are for Reading this Paper, and others are indifferent, whether it be Read or no; and those that are against Reading of it, are against reading of it because 'tis no Evidence: But that is no Reason why you should not Read it; for it is at most, but doing a vain thing.

I think you have been told already, If a thing of this Nature. was insisted on in the Courts below, It must be Read; the Court might say, 'tis not material, but if it was Insisted on it must be Read, and the other side must demur to it, and it must be Read
before

before they can Demur : So that the Question, Whether it is Evidence ? Must come afterwards ; and if you go according to the Rigour of the Law, with Submission, it must be Read.

Mr. Price. I did not design to trouble you in this Matter, but the Doctrine laid down by some Men of our Gown, surprizes me : 'Tis only an Averment, That the Court below ought to Admit this Paper to be Read, but there is no Precedent shewed, nor Convincing Reason given, why the Courts should Admit it. The Question is, Whether an Information taken before a Justice of Peace, ought to be Read here ? If it be to introduce a New Law, and make a New Crime, then, you may make a New sort of Evidence : But if this be a Crime against an Act of Parliament, or Law in being, then you must take the Evidence the Law doth afford you according to the nature of that Crime. The Charge here, is a Charge of Treason against a known Law : But the great Argument is, This is an Extraordinary Offence, that Sir *John Fenwick* or his Lady, had a hand in sending *Goodman* away : 'Tis a mistake ; and offering one thing that is not Evidence, brings us to another ; As to the Evidence of *Clancy's* tampering with Captain *Porter* ; Captain *Porter* does not say, that Sir *John Fenwick* Employed him ; only that *Clancy* said so, which is but a Hearsay, and that is no Evidence, unless *Clancy* was at the Bar, and would say it himself.

In the next place, it is said, That there was a tampering by a Solicitor : What is that ? Is it not natural for a Solicitor to say, Is there any Objections to such a Witness ? Is it not natural for him to lessen his Reputation if he can ? Now you would have a Copy of an Information to be Evidence. 'Tis said, 'tis tantamount : If so, then the Courts of *Westminster* Hall ought to intermeddle with it, and not this House. A Noble Lord mentioned to you the Law of Nature, the Law of Nations, and the Law of God, but he forgot one Law, which was

was most Material, and that is Martial Law, which if he had said, does justify the taking away a Man's Life upon extraordinary Evidence, he had said right.

Mr. Speaker. The Question is this, *That the Information of Cardel Goodman, taken upon Oath, 24th. of April, 1696. be Read?*

Which Question being put, the House divided.

Ayes, 218.

Noes, 145.

So it passed in the Affirmative. And Sir *John Fenwick*, and the Counsel, and Solicitors on both sides, were called in again.

Mr. Speaker. Gentlemen, since you withdrew, the House have consider'd of the Matter, upon which you did withdraw, and they have thought fit, that the Information of *Cardel Goodman*, taken upon Oath, before Mr. *Vernon*, 24th of April, 1696. be Read. — Clerk, Read it.

Cl. of the H. of Com. Reads — This is Signed *Cardel Goodman*, and Sworn 24th of April, 1696. before *James Vernon*.

About some two Years since, or better, I understood that Col. *Parker* was Resident here, in Order to Engage several People for the service of King *James*; and Captain *Porter* told me, he had a mind to see me, which he accordingly did; where he told me, there would be an Invasion, and that King *James* would be Restored; and that in Order to it, he had a Commission to Levy Men, and to Grant out Subordinate Commissions for a Regiment of Horse, and did ask if I would accept of one, which I accordingly did. He likewise said, he would see me as often as he could; and that Captain *Porter* and I should receive Directions from him, from time to time upon several Meetings; and having received my Commission, I understood what Captains were to be in the Regiment; which were Captain *Porter*, Sir *William Perkins*, Mr. *Charnock*, Sir *H. S. Mr. H.* and my self; and one Mr. *W.* to be Lieutenant-Colonel.

The

The Commissions were to be Blank when they were to be delivered, and to be filled up by the Captains. &c. I then came Acquainted with Mr. *Charnock*, and Sir *William Perkins*, and by them and *Parker*, Captain *Porter* and I were Informed, That there was a great Body of Horse to be ready in the North; but though I asked, yet they never named any Persons to me, but said, it was sufficient I should receive Orders, and a Roll to March, to Rendezvous upon Occasion; and indeed I did not much press it, because I did gather there were a great many Concerned, and at this time, Captain *Porter* and I took a House in the *Chase*, with Stables and Barns, fit for holding Horses, and as a fit place to meet, upon Orders given us to March, which were then daily expected.

Some time after this, Colonel *Parker* was taken, and being Committed to the *Tower*, he made his Escape; and after that, I saw him, and then he told me, he would be sure to Correspond with me and *Porter*; and I should receive his Letters of Mr. *Charnock*, or Mr. *Johnson*, and he accordingly did; and in his Letters he still gave us hopes, and said, he would certainly send us notice to be in Readiness time enough, to be Serviceable to the Design of the Invasion.

The last Letters I received from *Parker*, gave me Advice, That he doubted not, but the Cause would come to a hearing at this *Easter Term*; and he should Write no more, but bring the Orders himself; upon which I went to *Charnock*, and he told me, he did expect him here in a short time: But always or most commonly in his Letters, he told me, for a Sign, That when the *Thoulon Fleet* should join the *Brest Fleet*, I might certainly depend that we should be Invaded here.

During these Transactions Captain *Porter* complained, That something he was sending to *Lancashire*, had miscarry'd; he desir'd me to let by two

Boxes,

Boxes, which I looked not into, but supposed them to be Arms, and I did set them by for him : I had not bought any Arms, but had bespoke some of one Perry, a Gunsmith, who said I should have them ready at a Weeks Warning.

After Parker's having made his Escape, and getting into *France*, Mr. Charnock came to me, some time before the King's going to *Flanders*, and said, he had something to Propose to me; and desired me to go along with him, which I did; and he brought me to one Mr. W. who said, he expected a Commission from King James, to Seize King William; accordingly we went to the Chocolate House in S. James's-Street; and after some Discourse about the Commission he said he expected, we appointed another Meeting at that place, and Adjourned from thence to my House in Brownloe-street, where was present, Mr. Charnock, Mr. Porter. Mr. W. Major M. and Mr. D. The Subject of our Discourse was, about the Surprizing and Seizing the King as he came from *Richmond*; and after several ways Proposed to that Purpose, I particularly asked, Suppose that the King were in our Power, What then? For we ought to have Regard to some end or other in such an Undertaking; for I was not willing to offer any thing to his Person. Mr. W. said, we might have a Coach, and Convey him away; and he said, he was assured of a Fort to be delivered to him, and put into his Hands (to the best of my remembrance, it was *Deal*) which might give us shelter till we might find opportunity to carry him into *France* by Shipping. I must confess, I did see very little probability in what he said, neither did I believe, that he would receive any such Commission, as he said he expected: (For about two Years since, I remember I saw Sir George Barclaye, with Colonel F. and Mr. Porter; Sir George was then going over to *France*, and it was the only time that ever I saw him; and then

Captain

Captain *Porter* and I did desire, that if King *James* designed any such thing as Seizing King *William*, he would send over a Commission, and a Pardon withal in Case of an Accident; (which Message Sir *George* carry'd over, and King *James* refused to send it.) However, we had another Meeting after that at my House, by which time, he said, he would shew us the Commission, and Facilitate the Design; it was at a House behind the *Temple*, where the aforesaid Company met, and Mr. *W.* brought with him one Mr. *H.* who he said, could furnish us with a Ship, which would be ready to Transport us after we had Seized the King; but upon Discourse with Mr. *H.* we found that the Demands were so Exorbitant, and not in possibility of being Complied withal; and besides, no Order nor Commission being produced, we did desist then; for Captain *Porter*, and Major *M.* and I, did Declare we would not meddle without sight of the Commission. After this, Captain *Porter* and I talked of having a Vessel, and sending *Le Rue* and *Charnock* about it. We met at the *Fountain* by the *Temple-Gate*, and Sir *William Perkins* was there; and during the time of our being there, one called Sir *William* out, and Sir *William* called out *Porter*, who came in, and said, there was a Gentleman that could help us in this Affair; who he was, I know not; I believe Captain *Porter* may, for I saw him not: But all this proved ineffectual, for the King went away suddenly, and no Commission ever came. And by Letters from *France*, I understood King *James* was Angry, that they had used his Name to what he had not Promised; and *Porter* and I wrote over by his Order, the Truth of the whole Matter.

Some time after this, Captain *Porter*, the Earl of *Aylesbury*, Sir *John Friend*, Sir *William Perkins*, and Sir *John Fenwick*, and others, met about sending over some Proposals to King *James*, to expedite an Invasion; and likewise Captain *Porter* said, it was proper

per I should be there, for he had Engaged for me. I told him, I would come, and at the *King's Head* in *Leaden-Hall-street*, I found the Persons above-named, together with my Lord *Mongomery*, and one Mr. *Cook*.

The effect of their Consultation was, the sending Mr. *Charnock* with a Message to this Purpose; That if the King of *France* could spare such a number of Foot, and so many Dragoons, amounting to about 12 or 15000, or thereabouts, in all: That then upon notice given, that every particular Man there, was to furnish such a number of Horse, some more, some less, to be ready to Succour the Forces from *France*, when Landed. Mr. *Charnock* went and returned with a Refusal, that Forces could not be spared; Sir *John Friend*, and my Lord *Aylesbury* were of Opinion, That if King *James* would venture hither with some small Retinue, he had Friends enough to appear for him, without any Foreign Forces, but that was held in doubt.

I used afterwards to see my Lord *Aylesbury*; I always asked what News he heard? He said, when he Received any Orders, I should know, for he having been in *France* (as he did not deny) I supposed him not to be Ignorant of what was Intended.

And to the better Facilitating an Invasion, Sir *John Fenwick* used to send over a List of the Forces, and how they were Quartered, and what were in Garrison, and what otherways Disposed of: He having made a mistake in the Account, *Parker* did by Letter, desire me to try if I could procure such an Account; which I accordingly did of one *Gibson*, a Clerk in the Office, and sent it over frequently.

After the Escape of *Parker* out of the Tower, Sir *John Fenwick*, when I asked him, how he got away, and how much Money was given? He said, 200*l.* promised, and 300*l.* given? for when a Person came in and told him, he had brought him Liberty, and was

was to have 200 *l*. he replied, you shall have 300 *l*. and it was made good to him afterwards.

Cardel Goodman.

Much about the same time I used now and then, with Captain *Porter*, to be with Sir *John Fenwick*, and it was Agreed, That if *Parker* should not bring us timely Orders, That what Forces we could bring in, (*viz.*) *Porter* and I, we were to take Orders from Sir *John Fenwick*; this we offered him, and he kindly Accepted: And he then said, That he believed, most of my Lord *Oxford's* Regiment would go to King *James*. When I told Mr. *Paradise* had promised to bring in 7 or 8 to me, and that Mr. *Aynworth* was to bring in 20, and *Parker* had said, if I made 30. it was sufficient for me.

As to the keeping the Horses, Sir *John* said, it was dangerous, and they would certainly be Seiz'd; but the best way was, to have a List of what Horses were in and about the *London Stables*:

Captain *Porter* and I, sent accordingly to view the Stables. I sent Mr. *Reybough*, and Captain *Porter* sent *Cranborn*, and they took an Account.

Cardel Goodman.

Jurat. 24. April, 1696.

Ceram me, J^a. Vernon.

Mr. *Sergeant Gould*. Now Mr. *Speaker*, if you please, we will call some of the Grand Jury that will give you an Account what Evidence they found the Bill upon — Mr. *Gracedue*, you were one of the Grand-Jury that found this Bill?

Mr. *Gracedue*. Yes, Sir.

Sir *Thomas Powys*. This is so far from being Evidence, that I think 'tis the Oath of the Grand-Jury, That they shall not Disclose or Discover the King's Secrets. The Bill of Indictment is but an Accusation. A Bill of Indictment cannot be given in Evidence against a Man for the least Crime soever. It can't be given in Evidence to be Credited, because 'tis but an Accusation; and by Consequence, what-
ever

ever any Witness says at that time, can go no farther. When a Person comes upon his Tryal, they can't so much as resort to any thing that was Sworn before the Grand-Jury, nor make use of it.

Sir *Barth. Shower*. We humbly Oppose this Evidence; because the Gentleman can give no Instance either from their Reading or Observation, That the Testimony that hath been given before a Grand-Jury, hath been given in Evidence to a Petit-Jury: And 'tis part of the Oath of a Grand-Jury-Man, *That he should not disclose the same*. We do not say, such Rules will bind this House, but we hope the great Fountain of Law, will have some regard to the settled Rules of it.

Members. Go on, go on.

Mr. *Speaker*. Mr. *Gracedue*, Will you give the House an Account, who were the Witnesses before you upon finding the Bill?

Mr. *Gracedue*. The Witnesses before us, were Captain Porter, and Mr. *Goodman*.

Mr. *Speaker*. Can you remember so well as to give an Account to this House of what Evidence Mr. *Goodman* gave.

Mr. *Gracedue*. Yes, I think I can. When he came before us, he told us, That he was at a Meeting at the King's Head in *Leaden-hall-Street*, where there was Sir *John Fenwick*, my Lord *Mongomery*, Captain *Porter*, Mr. *Charnock*, and others; and the Business was to send Mr. *Charnock* over to *France*, to procure Men to Invade this Kingdom; and 8000 Foot, and 2000 Horse was proposed. He told us, the Result of that Consult was, That if *France* would supply 8000 Foot, and 2000 Horse, it would be a sufficient Power to come over; and that they would supply 2000 Horse among themselves. Upon which *Charnock* replied, Gentlemen, you send me over upon Uncertainties; you say, you will supply 2000 Horse, but unless you give me some Assurance, I can't nor will go. And the Question was proposed to all of them, If they would make good their Proportion, and they promised

mised it singly : Says I, Did Sir *John Fenwick* promise ? And he said, Yes. Says I, Did my Lord *Montgomery* ? And he said, Yes. He was asked, Who else ? But, says he, 'tis not a Question for you to ask us ; and for that he referred himself to me : For he said, he was not bound to answer further, having proved the Indictment.

Mr. *Serg. Lovel.* We desire Mr. *Joshua Meade* may be asked to the like purpose. Were you one of the Jury that found the Bill against Sir *John Fenwick*.

Mr. *Meade.* Yes.

Mr. *Speaker.* Pray, who where the Witnesses before you upon finding of the Bill ?

Mr. *Meade.* There was Captain *Porter*, and Mr. *Goodman*, Sir.

Mr. *Speaker.* Can you remember what Mr. *Goodman* testified then ?

Mr. *Meade.* Mr. *Goodman* did then testify, That Sir *John Fenwick*, my Lord *Montgomery*, &c. were at the King's Head Tavern in *Leadenhall-street*, and *Charnock*, and the rest there, did Consult how to bring in their old Master. As to *Charnock*, That they agreed to send him over to King *James*, to know whether the *French King* could furnish them with 8000 Foot, and 2000 Horse, and that they would endeavour to meet him with 2000 Horse. Hereupon *Charnock* (*Goodman* said) put it to every one of them, to know if they were all of one Mind ; and that they all said they were. This he did prove, and this is all I can remember.

Mr. *Serg. Lovel.* We have many more to the same Purpose, if the House think fit to hear them.

Members. No, no.

Mr. *Serg. Gould.* We will go thus much further ; That upon the Tryal of Mr. *Cook*, wherein there was Evidence given by Mr. *Goodman*, this Gentleman that is the Prisoner at the Bar was particularly named to be concerned, we will call them that were present there at the giving of the Evidence. But first,

first, we desire to read the Record of Cook's Conviction.

Thereupon a Motion was made for the Counsel to withdraw; And being withdrawn, a Motion was made for Candles, which passed in the Affirmative without a Division, in regard it being dark, without Candles there could be no Motion made for Adjourning the Debate or Remanding the Prisoner.

Afterwards a Motion being made for Adjourning the House till to Morrow-morning, the House divided.

Ayes 141

Noes 163.

And so it passed in the Negative, And Sir John Fenwick, and the Counsel, and Solicitors, were brought in again to the Bar.

Mr. Speaker. Mr. Sergeant Gould, The last Evidence you were about to offer was, That of the Record of the Conviction of Mr. Cook.

Sir Tho. Powys. Mr. Speaker, we oppose that being offered as Evidence. As I understand it, they are going to give in Evidence against Sir John Fenwick what was Sworn against Mr. Cook; that is not admitted in the Courts below; for, according to that Method, the Tryal of one in the Company would be the Tryal of all the rest. This was never allowed in any other Case, and I hope you will not allow it here.

Sir Barib. Shower. The Indictment is, That they did Consult together, but their Guilt is several; if they had been mentioned in one Indictment, and one had been Tried at one time, and the other at another, it would not have been allowed that they should give in Evidence against the one, what had been Sworn against the other: For though the Charge is by the same Witness, and for a Fact done at the same Time, yet the Defence of the Parties may be different; and it cannot be expected, That we, on the behalf of Sir John Fenwick, are prepared to give an Answer, in regard of any Thing that was Sworn against Mr. Cook.

Mr. Speaker. Mr. Sergeant Gould, you hear the Exception.

Mr. Serg. Gould. We hope in this Case we shall go on with our Evidence, as offered and proposed to this House. These Gentlemen have made their Objections, as if they were below in the inferior Courts; but we are here now before you, in a Parliamentary Way; and what is that which brings us here, but because there is a Witness withdrawn by Artifice, so that we cannot produce him? And therefore we come, and humbly apply our selves, to this Honourable House. Now Sir, you are Judges of the Method of coming at the Truth, and supplying that Defect; if we could produce him, there would be an End of the Matter; but in this Case we are in the Judgment of this Honourable House, Whether we shall not give such Evidence as he hath given upon his Oath, though in other Cases it is not admitted.

Mr. Serg. Lovel. When we produced the Record of Conviction, we only produced it to shew you there was such a Tryal; and by that means to let us in, to shew you what was Sworn by *Mr. Goodman* at that Tryal.

Then upon the Motion of Col. Granvill, and Sir Rich. Temple, Sir John Fenwick, and the Counsel, and Solicitors. withdrew.

Sir Rich. Temple. If I did not believe what is now offered, is, what was never offered before, and of dangerous Consequence to every one here, I would not have troubled you at this time of Night. There has nothing been offered that this hath ever been done. They say, It hath not been done in inferior Courts. Pray, let us see it ever it hath been done in Parliament, That what was given in Evidence at another Tryal, should be given in Evidence against another Person here, when this Person was not by, and had no opportunity to defend himself against it. I am sure it was never done yet.

Sir Tho. Mompesson. This Gentleman complains this was never done. When the Duke of *Monmouth* was Impeached, the Bill was read Three times in one day, and that Gentleman moved for the Impeachment.

Sir

Sir Rich. Temple. Here were three Witnesses that did declare they saw him in actual Rebellion, at the Head of an Army; but I hope I am not to answer for all the Proceedings then.

Col. Granville. When I saw the King's Counsel going on to make use of that as Evidence, which was never allowed in any Court, I thought I ought to move for them to withdraw. And I shall never give my Consent to have it Read, till some Body satisfies me 'tis good Evidence against *Sir John Fenwick*, I can't see how you can Admit this for Evidence. Are we to read all the Tryals that are upon this Plot? Therefore I desire you will bid them produce, What is Evidence against *Sir John Fenwick*, and not trifle with you.

Sir Tho. Littleton. If you proceed in this manner, I know not when you will have done. They do not tell you, they produce this as Evidence against *Sir John Fenwick*; nor do I take this to be the only Evidence to prove him Guilty. If nothing but exact proof would have satisfied, this Bill would have not been brought in: But this is to make as good Proof as the Nature of the thing will bear. You have heard several Things before, in Relation to *Goodman*, that possibly might strictly be no more Evidence against *Sir John Fenwick* than this, as *Goodman's* being withdrawn. First, they offered to prove that he was gone, next that it was Suspicious that *Sir John Fenwick* was privy to his going: Why did you admit the Evidence of what he said to the Grand-Jury? What is this but to give Evidence of what he said to the Petit-Jury, wherein the Grand-Jury and Petit-Jury have both believed him?

Mr. Harley. I think if you had come to one Determination before you had entred upon this Matter, you had very much shortned your Business, that is, That you would not expect such Proof as is necessary at Law; and it may be if you would come to it now, it would save you time: For I find by

the Counsel, that what is Sworn against another Man, at another time, would not be Evidence at Law against the Prisoner ; and I believe if he should except to a Jury-man, because he was upon *Cook's Tryal*, it would not be allowed as a good Exception, and he would be told, he was no way concerned in another's Tryal.

Mr. *John Howe*. 'Tis a strange sort of Evidence that is offered here, and it is a strange way of bringing it in. The House made nothing lately of hear-say, and yet now hear-say must be taken for Evidence. I have heard that the *Grand Jury* take an Oath not to discover what's Sworn before them ; yet you have brought them here as Witnesses to give an Account of what was Sworn before them,) which I am afraid is a breach of their Oath, it shall make me give less Credit to what they say. We are here to Attaint a Man, but we must not speak of Proof ; strange and new Doctrine ! If you do not find it with Proof ; the nature of the thing Implies it to be against Proof, every Mans Innocence is taken for granted till the contrary be proved ; And I have heard that two or three did swear, that *Goodman* was not at the place at the time he Swore he was.

Mr. *Harcourt*. If you please to let the King's Counsel go on upon this, you will save a great deal of time, and prevent any Exception to any Evidence afterwards : For 'tis not in the Power of Man to offer any thing more absurd. I don't believe that ever any Man heard of such a thing offered, that a Record should be given in Evidence against a Man, that is no manner of Party to the Record : I am sure never any such thing was attempted before. As for the other things, you had something offered that made it seem doubtful how far you should give Credit to them. Upon those Matters, the Counsel at the Bar for the King told you, That there was some Pretence that it was Law, and practised below, and a Book was produced to justify it : But in this
Case,

Cafe, If there be Book, Practise, Precedent, or any Thing to justify it, I will sit down; the Answer made it Ten times worse, The Gentleman said, He would only have the Record read; to prove what was sworn at that Tryal against Sir *John Fenwick*. Why does that concern any Person in the World but *Cook*?

Lord Cutts. If the worthy Gentleman that spake last had made out all his Propositions with Clearness, equal to the Assurance with which he asserted them, they would have more weight. But I will say, That which he hath asserted does not appear to me so. I take this to be the same thing in some Measure debated over again: It hath been told you, That this House are to give their Judgment in a Matter of great Importance, and therefore I think 'tis fit that all the whole Matter should be laid before them. When that is done, they only are the Judges of what Weight it is.

Mr. Sloane. I go along with those Gentlemen, That this is no sort of Evidence against Sir *John Fenwick*: But our Question is about a Witness that is withdrawn, and to know what he said, and how he was believed when he was here. How he is gone, we have seen already; and therefore though I think the Verdict against *Cook*, nor nothing of that, can be given in Evidence against Sir *John Fenwick*; yet if he hath withdrawn the Witness, and the Credit of him is at stake, as you have heard Evidence of what he said upon Oath, before the Tryal came on, by the same Reason you may hear what he said at the Tryal.

Mr. Pelham. I think it would shorten our Debates, if we were truly satisfied about what we are a Doing, That we are Trying, Sir *John Fenwick*, as we were told at the Bar. He called it a Tryal, and 'tis a Tryal. I must confess I was in hopes I should never sit in the House of Commons to try any Body; I did not think it the Business of us;

if I had, I would not have come hither: But since we are come into it, Is any Thing more natural, than to examine whether this Evidence be proper, or such Evidence as any Court would allow of?

Sir Will. Williams. I suppose there is no Gentleman of our Profession that hath seen any Record will say, That this hath been offered in any Court of Law. I believe, if he was upon his Tryal upon the Indictment, no Body will say it could be read against him. Let us consider how many Judgments that have been given hastily, in the late Reigns, have been reversed. What is the Reason that is given for it? It is for receiving that for Evidence which was not Evidence in the Law. Your Bill of Right takes notice of it.

Mr. Sol. Gen. I did not think this matter would have held you a quarter of an hour. But if the Gentlemen will debate upon the same matter that hath been over-ruled twice before, it is their fault; if this Matter is longer than it ought to be, all that is to be proved by this Record, is that one *Peter Cook* was attainted of High-Treason; if the Counsel on the other side would have owned *Peter Cook* to have been attainted, you had not been troubled to have had the Record brought to the Table. But as to what they say, that *Sir John Fenwick* was no Party to the Record, and therefore it can be no Evidence against him, It is true, Of it self it is no Evidence against him, but this as it is opened is to introduce the Evidence of what's Sworn by a Witness upon that Tryal which cannot be done, Unless that Tryal be first proved by the Record of it; yet after the proof of that Tryal, whether you will admit what the Witnesses Swore in that Tryal, shall be Evidence in this Case, will be considered hereafter.

I Believe no Body will deny, but that what *Goodman* Swore in that Tryal, might have been Evidence for *Sir John Fenwick*, as suppose *Goodman* had sworn in that Tryal that he himself had never been at the

King's

King's-Head-Tavern with *Sir John Fenwick*. Would not the Prisoner have produced a Witness to prove what *Goodman* had sworn in that Tryal, if he should have appeared now, and have Sworn that *Sir John Fenwick* and he had been at the *King's-Head-Tavern*, about the matter *Sir John Fenwick* is now accused of.

I will put you in mind of a Case, because there is a Nicety stood on in this matter without any reason.

It was in the Tryal of Alderman *Cornish*; he was indicted and tryed, and the great matter (as it was pretended) was Transacted in the House of One *Sheppard*. There was a Witness against *Cornish*, One *Rumsey*, who Swore what *Cornish* said upon the reading a Declaration in *Sheppard's* house; says *Cornish*, *Sheppard* was a Witness at my Lord *Russel's* Tryal, and in that Tryal named who were present at the reading the said Declaration, but he did not name me to be one: And when *Sheppard* in the Lord *Russel's* Tryal said he thought *Rumsey* was also in the Room at the same time the Declaration was read, *Rumsey* in that Tryal stood up and said the Declaration was read before he came into the Room, and therefore what he Swore in the Tryal against *Cornish*, was a contradiction to what he swore in the Lord *Russel's* Tryal. Mr. *Cornish* in that Tryal would have produced a Witness to have proved what *Rumsey* Swore in the Lord *Russel's* Tryal; says the Court we cannot admit of that Evidence, for it doth not appear to us that the Lord *Russel* was ever Tryed for *High-Treason*, and unless a Record of that Tryal be produced, we cannot admit the Evidence of what *Rumsey* Swore in that Tryal, and thereupon by that Slip was that Gentleman destroyed.

I pray the Record of *Cook's* Tryal may be read. I have given no Opinion of what force it will be. But I think it depends upon the same reason, as you have ordered other things to be read, which you intend to consider and give your Judgment of hereafter.

Nay

Nay, you have more reason to do this, than any thing you have read this day.

Mr. Price. 'Tis very much pressed, That you should Read that which when Read, they say, is not Evidence, but only to introduce another Matter. If it be not Evidence, upon what Account should they Read it? But if it introduce other Evidence, this is an Ingredient and Part of that Evidence. Now suppose the Record should be produced, and they should bring Witnesses to say what *Goodman* Swore at that Tryal, would that be Evidence? No sure, for no body ever pretends that this hath been Admitted either at Law, or in Parliament. By what Law? By what Rule? By what measure of Reason are we to Proceed in this House? If you will admit to be produced a Record of Conviction of a third Person, and this to be Evidence against one that was not present at that Conviction, I think you may as well Admit to be produced a Record of the Conviction of any other concerned in the Assassination. But I stood up Principally upon the Observation made at the Bar, and he puts you that which he takes to be a simile Case; says he, suppose Sir *John Fenwick* had brought this Record, and made use of it to take off *Goodman's* Testimony, should it not be Evidence? Yes, no doubt of it, and there is this Distinction: 'Tis one thing where you are to give in a Record to Convict and Attaint a Person, and another thing where 'tis to prove a Man Perjur'd, and to Invalidate his Testimony. For when a Witness is brought against a Prisoner, he hath no way to take off his credit, but from what is Colateral. If upon a Tryal wherein another is concerned, a Witness gave a contrary Evidence, or the Party was Acquitted, then that Record may be made use of against that Witness: But it differs very much, where you bring Evidence to take off the Credit of a Witness, and where you bring it to Convict or Attaint a Person. The Case of *Cornish*, That turns upon the same Reason, and it was only to be used

to take off the Testimony of *Rumsey*. But if this Record of the Conviction of *Cook* be brought to any purpose now, 'tis to satisfy our Consciences, that *Goodman* gave a good Testimony at that Tryal; and I wonder the Sergeant should offer it, who is Sworn to offer nothing in Violation of the Law.

Dr. Oxenden. If I did not think this Question had been Determined before, I should not trouble you in this Debate, for did we not receive what *Goodman* deposed upon Oath before a Justice of Peace? Was it received because it was taken in Writing, or because it was his Evidence? Now they offer you an Evidence of his, that was not put into Writing; but they will prove it by Witness. What is the Difference; if it had been taken down in Writing, it must have been Admitted as the same was before.

Sir M. Wyvell. That worthy Gentleman desired to know the difference, &c. That Deposition was against *Sir John Fenwick*, but this Evidence that they offer now, was given against *Peter Cook*.

Mr. Att. Gen. You are now upon a Debate, Whether you shall Read the Conviction of *Peter Cook*? I do agree with those Gentlemen that have spoke of this Matter, that the Conviction of *Cook*, nor any Evidence upon his Conviction, can be Evidence against *Sir John Fenwick*. I don't pretend that this is; Nor don't believe that this is offered upon any such Consideration. But 'tis one of the Allegations of the Bill, that several of these Gentlemen were present at this Consult, of which *Sir John Fenwick* is Accused; therefore I suppose the Counsel for the Bill, did offer this Record to make good that Allegation, and so I think it may be properly offered, unless it be Admitted. I don't see how it can be made good further. I do not think it proper to Examine to what *Goodman* Swore at *Cook's* Tryal.

Sir Will. Williams. I now speak only to shew my Concurrence with the Attorney-General; Mr. Attorney hath Stated it right. No doubt, as to the Conviction

viſion of this Perſon (as Mr. Attorney offers it) it may be proper enough.

Members. Call them in, call them in.

Sir *Chr. Muſgrave.* I hear Gentlemen ſay, Call them in. Do you intend when you call them in, to Read this Record? I think the Learned Gentleman hath Stated it, That it ought not to be Read as Evidence. Now the Counſel for Sir *John Fenwick* ſaid, they hoped you would not ſuffer it to be Read as Evidence againſt the Priſoner. I never heard the Counſel ſay, that *Cook* was not Attainted, nor ever heard that any Man did doubt it. Then if it be no Controverſy between the Counſel, to what end is it brought hither? Do you think that the Steps that are urged to be taken in this Caſe will not be urged with great ſtrength hereafter, and that this will not be a Precedent for Poſterity? I take it that there is a great deal of difference between the Paper you have Read, and this Record, and therefore if you call in the Counſel, I hope you will not gratifie them in Reading of it.

Mr. *Edw. Harley.* Before you call the Council in, I humbly propoſe it to you to conſider to what purpoſe this Record ſhould be Read; if as Evidence, you overthrow all the Courſe of Proof that is ſettled by the Common Law, and Statute Law; for it hath been in all Tryals oppoſed, to give in Evidence that which is improper, becauſe it ſhould not Influence the Jury. I would not have it ſaid, That under the Reign of *K. William*, any thing was done contrary to the Law and Conſtitution of the Nation. There hath been an Inſtance given of the Tryal of Mr. *Cornish*, though that Caſe does not come up to it, but we know what was done in thoſe Reigns have been juſtly reflected upon: and I hope you will not make a Precedent here, to encourage Judges to do what is againſt Law.

Mr. *Speaker.* Gentlemen, this is your Queſtion, That the Record of the Conviction of Peter Cook ſhall be Read,

Which

Which Question being put, the House Divided,
 Ayes 181. Noes 110.

So it passed in the Affirmative.

Mr. *Speaker*. Gentlemen, you have had another Question that hath been the Subject of your Debate, *That the Counsel for the Bill be admitted to give Evidence, as to what Goodman Swore against Peter Cook.*

Mr. *Rob. Harley*. The Learned Gentleman did tell you, That what *Goodman* said at that Tryal, ought not to be given in Evidence; and therefore, I think, Gentlemen won't insist upon that, that is carrying it too far; and I think, he opened it, That it was only to prove that *Cook* was Attainted, and to make use of it no further.

Mr. *Speak*. Is it then your Pleasure, that Sir *John Fenwick* and his Council be called in?

Which Question being put, it passed in the Affirmative, and Accordingly they were called in.

Mr. *Speak*. Sir *Tho. Powys*, The House hath Determined to have this Record Read, not as Evidence, against Sir *John Fenwick*, but to prove the Allegations in the Bill, and that *Cook* was Attainted, Read the Record.

Accordingly that Record was Read by the Clerk.

Sir *Barth. Shower*. We are sure the Record does not prove that he was Convicted upon *Goodman's* Evidence.

Mr. *Serg. Lovel*. Look upon the Indictment.

Sir *Tho. Powys*. It appears by that, That *Goodman* was a Witness upon the Indictment; but it does not prove, That he was a Witness upon the Tryal.

Mr. *Serg. Gould*. May it please you then, Mr. *Speaker*, thus far 'tis Agreed, That here is a Record of the Conviction of *Cook*, and 'tis Agreed, and the Record speaks it, That *Goodman* was a Witness, for it is Indorsed upon the Indictment. Now the main Dispute is, Whether *Goodman's* Evidence did prevail to Convict *Cook* upon that Indictment? And for that we shall apply our selves, and Call our Evidence,
 some

some of the Jury, and some that were then Witnesses, and they will give you an Account upon what Evidence that Conviction was.

Sir Tho. Powys. In what you were pleased to acquaint us at our last coming in, you were pleased to give such a Reason in Relation to the Reading of this Record, that if we had heard it before, we would not have troubled you to have withdrawn; for it was proper to make out the Allegations of the Bill, and that *Cook* was Convicted; but we apprehend they can carry it no further than what they have applied it to. But I perceive from hence, the Gentlemen on the other side are encouraged to proceed to another piece of Evidence, such they call it; they are going to call the Witnesses to prove what was Sworn at the Tryal of *Cook*, where *Sir John Fenwick*, nor no Person on his behalf, was present, either to hear, or observe, or cross Examine, or offer any thing to their Credit, which possibly he might be furnished with, though *Cook* was not; I hope that will be no more allowed of as Evidence here, than in any other place.

Sir Barth. Shower. We humbly oppose their calling of Witnesses to give this Account of the Evidence given at *Cook's* Tryal. And we submit it to your Consideration, whether you will think it Just, that the Evidence that is given with respect to one Man only, shall conclude another Person that stands at a different Bar in defence of his Life, or that it shall be given against him. Every Man's Defence is several; and we oppose the Reading of the Record before, and so do now the calling of any Witnesses to this purpose, for the same Reason.

Mr. Serg. Lovell. We call these Witnesses for no other purpose, but to prove that *Goodman*, what he did Inform by that Paper, he did Swear before a Jury; *Then a Motion being made for them to withdraw.*

Mr. Speak. Gentlemen, you must withdraw.
Accordingly they withdrew.

Mr

Mr. *Manley*. I thank God I have that regard for the Laws of *England*, and to every English Man's Life, that when I see any thing Attempted against them I must give my Testimony against it, I did not believe they would have insisted on it, for there was a Gentleman that sat near to you, who in the Close of his Debate, I thought had satisfied every body, That this was a thing that ought not to be Read : if they should do it, it would be a thing of dreadful Consequence. If you should Admit of every thing these Gentlemen that come in for the Bill offer, I know not where it will end. How will it appear, that upon *Goodman's* Evidence the Jury found *Cook* Guilty ? For they might find *Cook* Guilty, and yet give no Credit to *Goodman* ; for he was contradicted materially, and there might be other Evidence upon which they might find him Guilty, and yet lay aside the Evidence given by *Goodman* : But whether one way or the other, we can't tell. They tell us, we are not to be guided by the Rules of *Westminster* Hall : But we are to be Governed by the Rules of Justice, and we are not at this time to seek a way to the King's Favour by Voting against a Criminal for High Treason.

Mr. *Sloane*. There is no manner of doubt of it, but that Gentleman is in the right, who tells you, If this Indictment and Conviction of *Peter Cook*, stood singly, as to Sir *John Fenwick*, 'tis no Evidence, and if they will produce *Goodman* now, it shall be no Evidence against them ; but take the Case as it is, Here is a Witness, who hath given me satisfaction, that 'tis one of Sir *John Fenwick's* Friends or Agents (which is the same thing as if done by himself) by whose means this Witness is withdrawn : Now the Question is, *What could this Witness say, if he were here ?* What did he say ? 'Tis not Conclusive, but 'tis Material for you to hear what he did say when he was upon his Oath.

Sir

Sir Chr. Musgrave. The Gentleman of the Long Robe that spoke last, was pleased to tell you, It is very reasonable that you should hear those Persons, as to what Goodman Swore at Cook's Tryal. I confess, I think this is harder than all the rest, because what you have hitherto Admitted was in Writing. One thing was an Examination before a Justice of Peace, the other a Record; but for any Man to say, he can exactly repeat what any Man Swore at the Tryal, to me is wonderful. Why in his Evidence, the least mistake of a Word alters the Nature of the Thing, and therefore this would be a bold undertaking for any Man; for if he varies in the least Circumstance, 'tis not true that he Swore so then. This Gentleman was no ways concerned in that Tryal, and to what purpose is it Read, if not to the Prejudice of Sir John Fenwick? I do not know but by the same Rule you may hear Evidence of what any Man hath Sworn upon all the Tryals these three quarters of a Year.

Mr. Sloane. I have been called upon, to know in what Cases Testimony hath been given, that Witnesses have Sworn so and so at a former Tryal. 'Tis every days Practice between Party and Party, that where a Witness does die, between the same Parties (I will state the Case fairly) 'Tis given in Evidence, That such a Witness at such a Tryal, did Swear so and so. Sometimes they take it in Short-Hand, and then they can tell the Words of it, otherwise they repeat it upon their Memories, but I will not strain it. But I put it with a further Reason upon it, for we do not desire to hear it as Conclusive Evidence upon the Prisoner, but only in this Sense, Here is a Witness supposed to be carry'd away by the Prisoner's Means, and therefore, is it not necessary to hear what he said before he was deluded and carry'd away? Not that after it is heard, it is any Conclusive Evidence, but it is reasonable that we should come at the Truth, *Omnibus viis, & modis quibus Melius scire poterit.*

Sir

Sir Tho. Littleton. A Gentleman says, to what purpose should it be Read, if it be not to the Prejudice of Sir John Fenwick? On the other side, we may say, 'tis for his Benefit; that is only supposing one way or another: I will hear any body to his Benefit, and any Body to his Prejudice. Says a Worthy Gentleman, It is not done in Criminal Cases: Why, in this Case you have heard the Grand Jury, what he Swore before them already; And what Objection is there more against hearing what he Swore in another Case, than against hearing what he Swore upon the Indictment? The main Inducement for you to hear it, is because he is gone away, (and can't be heard *Viva Voce*,) and with Suspicion that it was by Contrivance of the Party.

Mr. Gery. I would speak but one Word as to what the Gentleman that spake last, but one, said, and that is, as to the Courts below, That one Man is allowed very often to give in Evidence what another Swore. It hath been so, and 'tis at the Peril of any Person that Swears, that he Swear Truth, for he may be Prosecuted if he does not Swear Truth. But I would ask him, What remedy there is if he do not say the Truth here? We have no remedy against him if he takes away this Man's Life by what he says here.

Mr. Smith. Truly, Sir, if I must give my Opinion, I do think 'tis very reasonable, that Bills of Attainder should be only upon Extraordinary Occasions. I think that, take it at best, if there was not a place where the Witnesses are to be Sworn, and more particularly Examined, I know not whether I should give my consent for the Passing of this Bill through your House; for the Witnesses against the Prisoner are not Sworn, nor the Witnesses brought against them; so that we can only give our Opinion upon the Probability of the Matter: For what that Gentleman says, weighs with me, That 'tis a Difficult thing for any Man to Charge
K himself

himself with what was Sworn at a former Tryal; for the mistake of a Word may alter the Sense very much. We are told, by a Worthy Gentleman, That there was two or three Witnesses that did give such Evidence against the Testimony of *Goodman*, that 'tis a wonder almost how *Cook* could be found Guilty: It is our misfortune that *Goodman* is not here, it would have been worth our while to have heard what *Goodman* could have said in his own Defence; but since there are such Witnesses like to be offered against *Goodman's* Testimony, Is it not reasonable that we should hear what *Goodman* said for himself?

Mr. *Howe*. Sir, I always thought it very reasonable, that you should hear any Evidence that might tend to your Information; but I think 'tis plain, that nothing can tend to your Information, that is alledged by any Person that is not to be believed; That is to say, is not to be believed from the Nature of the Evidence, though the most Credible Person in the World. I know not whether these Witnesses are to be brought or no, but I have heard that *Cook*, after he was Condemned to die, without any apprehension of his being Saved, did upon the Sacrament Declare, That *Goodman* was not upon the place at that time he Swore himself to be there. I have heard since, that the same Divine that gave him the Sacrament, Dr. *Wake*, when he heard he had again Contradicted that so solemn Declaration, had such an Abhorrence of the Proceedings on all sides, that he would go to him no more. I can't think we can have Information from these Persons, who I suppose did not think of giving Evidence in this Tryal, and therefore did not take notice so particularly of what he said, and if so, 'tis losing your time.

Mr. *Speaker*. Gentlemen, the Question is this, That the Counsel against Sir John Fenwick be allowed to Examine Witnesses, as to what *Goodman* Swore at the Tryal of Peter Cook.

Sir

Sir Godfrey Copely. I must confess it would weigh with me, if it had been made appear, that Sir John Fenwick had taken off any Evidence, and I should be ready to supply it as well as I could; but I must needs take notice of what was said in this Debate, that we had done as much as this comes to already. This makes me a little more apprehensive, and to take care what we do now, since what this House does, hath so quick an Operation. We are citing Precedents of this very Day already, and make one thing a Hand to draw on another, and so they may easily be made use of in after Parliaments.

Sir Hen. D. Colt. I believe no one Gentleman doubts, that Cook was Convicted upon the Evidence of Goodman; if they do, I would know the Reason of it; for upon the last Act, there are to be two Evidences to the same Treason: There was but two positive Witnesses against him for Treason, and they were Porter and Goodman: I think therefore, he was Convicted upon the Evidence of Goodman; What then needs any Person to remember any Particulars that passed at the Tryal, if they remember in the whole that he was Convicted by the Evidence of Porter and Goodman?

Mr. Speaker. As many as are of Opinion that the Counsel against Sir John Fenwick be allowed to Examine Witnesses, as to what Goodman Swore at the Tryal of Cook say, Aye.

And the Negative being put, the House divided.

Ayes 180. Noes 102.

Afterwards the Question of Adjournment was put, and it passed in the Negative.

And Sir John Fenwick, and the Counsel, were brought in again.

Mr. Speaker. Mr. Sergeant Gould, the House do allow you to Examine Witnesses as to what Goodman Swore at the Tryal of Cook. Pray go on with your Evidence.

K 2

Mr. Serg.

Mr. Serg. Lovell. We call Mr Collins, Sir.

Who was brought to the Bar.

Mr. Speaker. Was he a Jury-Man?

Mr. Serg. Lovell. He was one of the Petit-Jury, Sir,

Mr. Speaker. Mr Collins, can you give the House an Account of what was Sworn by Goodman, upon the Tryal of Cook?

Mr. Collins. To the best of my Memory, I will give the best Account I can. Goodman did Depose, That he came to the King's Head in Leaden-Hall-street, and enquire for Capt. Porter, according as the Captain had Ordered him, and the Captain came down and carry'd him up into the Room where the Gentlemen were. There was Sir John Friend, Sir William Perkins, Mr. Charnock, Mr. Cook, and Sir John Fenwick; there was two others, if you please to have me Name them,

Members. Yes, yes.

Mr. Collins. My Lord Aylesbury, and my Lord Montgomery. This was what he Deposed.

Mr. Speaker. Go on, Sir, you have Named those that were at the Meeting.

Mr. Serg. Lovell. Did he give you an Account of what was Agreed on at that Meeting?

Mr. Collins. I think, it was about sending Charnock to France.

Mr. Speaker. Sir, you should Repeat all the particulars what Charnock was to do.

Mr. Collins. I can't remember any thing further than what I have told you.

Mr. Serg. Gould. If you please that Mr. Cooper may be asked to this.

Mr. Speaker. Was you of the Jury that Convicted Mr. Cook?

Mr. Cooper. Yes.

Mr. Speaker. Can you give the House an Account what Evidence Goodman gave to you for the Conviction of Cook, and what he said in that Evidence?

Mr. Cooper.

Mr. Cooper. Mr. Goodman did Declare in his Evidence, That he was at the *Old King's Head* in *Leaden-Hall-street*, where he did meet with divers Persons that were in Consultation; he named *Charnock*, Sir *John Fenwick*, Sir *John Friend*, and divers others.

Mr. Speaker. What was the Consultation?

Mr. Cooper. It was about sending *Charnock* over into France.

Mr. Speaker. To what purpose?

Mr. Cooper. To bring over Forces, or encourage the bringing over of Forces: That was the Purport of his Message.

Mr. Speaker. Will you produce any other Evidence to this Point?

Mr. Serg. Gould. We desire this Gentleman may be asked to the same purpose.

Mr. Speaker. Was you one of the Petit-Jury.

Another Witness. There was Capt. Porter, and Mr. Goodman, that were the two Evidences; and Goodman did say, That he had been at the *Old King's Head* in *Leaden-Hall-street*, one *Coxe's*, and Sir *John Fenwick* was there, and several other Gentlemen, Consulting of an Affair to send over into France for some Forces to be brought over into England, and that *Charnock* was the Person they all Agreed should go over.

Mr. Speaker. But did he give you an Account of what Cook and the others did Agree to, upon which you found Mr. Cook Guilty?

The same. We did apprehend that Cook did Consent, that *Charnock* should go over to France, and acquaint King James, That there had been a Meeting of several Gentlemen, and that they had made several Offers of Soldiers and People that were to be raised here, and to acquaint King James with it, and he Declared, That Sir *John Fenwick* was there at the same time.

Mr. Speaker. Pray, can you give this House an Account of what Exception was taken to Goodman's Credit, and how it was answered?

The same. There was Exception taken, That he was Guilty of a great many Crimes, and that he had his Pardon, and the Fines were Levy'd upon him ; but it was said there, that he had payed his Fine and that he was a very good Evidence in the Case.

Mr. Speaker. Mr. Sergeant Gould, Have you any other Evidence to produce ?

Mr. Serg. Lovell. If you please, Mr. *Speaker*, here is Mr. *Tanner*, the Clerk of the Arraignments, that best knows the Nature of these things. As to these Objections that were made, it appeared to the Court to be a Contrivance, for he was never Bailed, but discharged without any more to do. If you please that he may be asked, What Objections were made to *Goodman's* Reputation, and what Answer was made to it then ?

Mr. Speaker. I did ask the Jury-Man that ; and I suppose you need not labour that Point unless the Credit of *Goodman* comes in question here.

Mr. Serg. Gould. Then may it please you, Mr. *Speaker*, we have one other piece of Evidence against Sir *John Fenwick*, which we are humbly to offer to your consideration, and I think 'tis very Material, and 'tis some of the Evidence which I did open in Stating of the Case, wherein Sir *John Fenwick* hath, in a manner, given a Verdict against himself. For while Sir *John Fenwick* was working of his Escape to go beyond Sea, at that very time there was a Letter written by him, directed to his Lady and delivered into the hands of one Mr. *Fewler*, who was to cause it to be delivered to his Lady, the Letter was delivered by one *Webber*, who was taken up when Sir *John Fenwick* was. This Letter Imports, That Sir *John Fenwick* look'd upon himself, as having no Defence, but depended only upon a Contrivance with the Jury ; and he advises to work with some Persons of the Jury, who were to stand it out, and to starve the rest ;
and

and so by that Means to save him. Our Evidence of this will be, It falls out that *Webber* (we have him not here now, but have endeavoured it as much as was possible, but he is gone too out of the Way) that was taken at the same time that Sir *John Fenwick* was; but by reason of the Protracting of Sir *John's* Tryal, was Delivered, there being no Charge against him, is since his Deliverance, upon his *Habeas Corpus*, gone out of the Way. But we shall, in the Method of our Evidence, produce you Mr. *Fowler*, the Person to whom this Letter was handed, who will give you an Account of this Letter, and then we will produce this Letter. To which End, we must humbly beg the Favour of a Worthy Member of this House, Mr. *Vernon*, who hath this Letter, that it may be produced, and shewed to Mr. *Fowler*.

Mr. *Vernon*. Sir, I receiv'd your Order to bring the Letter that Sir *John Fenwick* wrote, while in Custody at *Rumney*, which was sent up to me by Mr. *Mascal*, who had it of Mr. *Fowler*. And if you please, I am ready to deliver it.

Mr. *Speaker*. Who sent it to you?

Mr. *Vernon*. One Mr. *Mascal*, a Justice of Peace of *Rumney*.

Sir *Tho. Powys*. I hope now we shall make an Objection to this Letter, with good Authority. Surely for them to produce a Letter, as Sir *John Fenwick's*, is not to be allow'd as Evidence, unless it was proved that he wrote it, because that sort of Evidence was particularly taken notice of by Parliament: And Judgment given upon that sort of Evidence, by Comparison of Hands in the Case of Mr. *Sidney*, and the Act of Reversal of his Attainder, does declare it to be illegal Evidence. This is such an Authority, as, I hope, will bear no Dispute. And the Courts of *Westminster Hall*, have since thought it so; they did so adjudge in the Case

of Crosby, who was Tryed the other day in *Westminster-Hall*.

Sir Barth. Shower. In this Objection we have the Opinion of inferior Courts, and the Parliament too; for the particular Evidence Mr. *Sidney* was Convicted upon, was a Paper found in his Closet, and proved by some who pretended to know his Hand. We do therefore humbly oppose this Evidence, It being in the Case of the Life of a Man; and the King, Lords and Commons, having declared, That this sort of Evidence ought not to be allowed. And therefore, I hope, you will not allow it in this Case.

Sir Tho. Powys. I have a Copy of the Bill for reversing the Attainder in my hand; and it says, *The producing a Paper found in the Closet of Mr. Sidney, which was not proved by any Witness to be his Hand-writing, &c.* And, we hope, if in the Judgment of the Parliament that was not thought reasonable Evidence to Attaint him, this will not be thought reasonable in Parliament to Attaint this Gentleman.

Mr. Seng. Gould. As this Case is, we hope this may be a concurring Evidence. It will be plain upon the Evidence we shall give, That *Webber* was with Sir *John*, and taken with him; and at that time this Letter was handed by him over to *Fowler*, to be carried to Sir *John Fenwick's* Lady. Now, Sir, we humbly offer it to your Consideration, How far 'tis available, and what Operation it will have? Whether in a Case of this Nature, these two being taken together, and *Webber* delivering this Letter to Mr. *Fowler* to deliver it to Sir *John Fenwick's* Lady, and the import of the Lady concerning Sir *John Fenwick* for his Acquittal, you will not suffer it to be read? 'Tis not to Charge him with a Treason, for that was the Case of Mr. *Algernoon Sidney*; it do's not prove a Crime upon him; but if you please we can prove that Sir *John Fenwick* handed

ded this Letter over that it might come to his Lady, by which he desired his Lady so far to work the Matter, That some Jury-man might be found to starve the rest, and stand out for him. If we could produce Webber we would. 'Tis plain, Webber corresponded with Sir John, and was with him.

Mr. Serg. Lovell. I humbly beg one Word in this Matter. The Counsel on the other side do very well know the constant Practice is, That in the Case of a Deed or Will, let the value of the Estate be what it will, if the Witnesses can't be produced, or are gone beyond Sea, they always admit Evidence by Comparison of Hands. But for the Case of Mr. Algernoon Sidney, there is no doubt but his Attainder ought to have been Reversed, because that Attainder was upon no other Evidence, but from a Paper, that he himself did say, was only for the Exercising of his own Ingenuity and Parts; and proved only by the Comparison of Hands. Had there been any other Witness to corroborate it, it had altered the Case. In our Case, we do produce the Letter, not for the Convicting of the Prisoner at the Bar, but we are humbly to lay before you all the Matter of Fact. It will be worthy of your Consideration, what you will think fit to take, and what to reject, that is a Matter for your own Judgment. We produce this Letter for this Purpose, to shew you, That after Sir John Fenwick was taken, he apprehended his Case to be so Desperate, that he used these indirect Means.

Mr. Speaker. What mean you by that? This Letter came from Mr. Fowler.

Mr. Serg. Lovell. Here is Mr. Fowler that receiv'd it from Webber, in the presence of Sir John Fenwick.

Mr. Speaker. Shew Mr. Fowler the Letter.

Accordingly the Clerk went down to the Bar, and shew'd Mr. Fowler the Letter.

Mr. Speaker.

Mr. Speaker. Do you know that Paper ?

Mr. Fowler. Yes, Sir.

Mr. Speaker. Where have you seen it before ?

Mr. Fowler. I had it from one *Webber*, that was at *Rumney*, about the 13th of *June*, as I remember.

Mr. Speaker. Was that the Time that Sir *John Fenwick* was Seiz'd ?

Mr. Fowler. He was then at *Rumney*. Mr. *Webber*, I was told, had some Acquaintance with me, and desired to speak with me. I went to him, and he was rising, and when up, says he, Mr. *Fowler*, I would desire you to put a Letter into the Post, says he, There is no Hurt in it, it is directed to Mrs. *Frances Farrer*, at the Countess of *Carlises* in *Soho Square*, and when I had deliver'd it, he desired me to come to him again.

Mr. Speaker. Did you come to him again ?

Mr. Fowler. Mr. *Mascal* of *Rumney* sent for me to his House, and told me, That he had heard that I had received some Letter from Mr. *Webber* ; and when he had open'd it, and saw what it was, he thought fit to send it up to the Secretary of State ; and I made my Mark upon it, that I might know it again.

Mr. Speaker. Have you made your Mark upon it ?

Mr. Fowler. Yes, Sir.

Mr. Serg. *Lowell*. I desire he may be asked, Whether Sir *John Fenwick* was not in the same Room when *Webber* delivered it.

Mr. Fowler. Yes, but I question whether he saw Mr. *Webber* give it ; for he delivered it privately, as I thought.

Mr. Speaker. Was Sir *John* in the Room then ?

Mr. Fowler. Yes, Sir.

Mr. Speaker. Can you say any thing more of Sir *John's* Knowledge of that Paper ?

Mr. Fowler. No, I know no more.

Mr. Serg

Mr. Serg. Gould. If you please then, *Mr. Speaker*, because perhaps it may be some Objection and expected that we should give an Account of *Webber*, We will call a Witness, that we have done our utmost to find him out.

Members. No, no.

Sir Tho. Powys. That which I was going to offer is, That this Proof is short, of that which in the Act of Reversal of the Attainder of *Mr. Sidney*, is admitted to be no Proof against him; for the Act recites that a Letter was found in his Closet, and proved by Comparison of Hands, and yet for all that, this sort of Evidence is condemn'd by this Act of Reversal, as illegal Evidence. This Case before you, comes short of that: for here is no Proof by Comparison of Hands, nor that it was in the Possession of *Sir John Fenwick*: But only that a Person in the Room, without the Privity of *Sir John Fenwick*, delivered it to another, and the Witness says, he did it in a private manner.

Sir Barth. Shower. With submission, this Letter could not be Read in any Place whatsoever, against *Sir John Fenwick*, in a Civil Cause; for even in that Case they must prove it to be his Hand-Writing, by Comparison of Hands.

Mr. Serg. Gould. I think not to insist upon it. But that we shall desire is this. We have now done with our Evidence, only we shall desire the Worthy Member, *Mr. Vernon*, to give an Account what was the Reason, why *Sir John* hath not been Tried; for indeed, he hath very much Trifled with the Government, pretending still to make a Free and Ingenuous Confession,

Sir Tho. Powys. I am of Counsel for this Gentleman at the Bar: for his Life, for his Fortune, for All that he hath in the World. 'Tis not only this Gentleman's Case, but 'tis a Case that may be of Great Consequence in all future Times. I have, as 'twas my Duty, Attended for at least these

12 Hours, either in opening the Matter, or by producing such Evidence, as we hoped we did fairly Object to. Sir, there are several Things offer'd on their Parts, which I confess we little expected, and which will require something to be said to; and I have a great deal to offer on the Behalf of Sir *John Fenwick*, both as to this Method that is taken, and what is alledged in the Bill, and what is contained in the Indictment upon which the Bill is founded, wherein I desire to be Heard; and since you have been pleased to Allow us to be Counsel for him, I am sure we shall have a fair and favourable Hearing. We have a great deal to offer to you, both as to the Matter of the Indictment and the Manner of it; and I hope to shew you, That the Indictment, as it is laid, does not contain a sufficient Charge of Treason. We have likewise a great deal to say, as to the Evidence they have offered, at least what they call so: But I must make it my Request, That we may have Liberty till to Morrow Morning to make our Observations, and Answer what hath been said by the Counsel on the other side. I am not in a very good Condition by this long Attendance, and by Attending my Duty in the Courts in *Westminster-Hall* to do my Duty here, as may be expected from me. I must own it, I am not prepared as I ought to be, and I hope when there is so great a Stake, you will allow us till to Morrow Morning?

Sir *Barth. Shower*. I beg your Favour in the same manner, and to the same effect as Sir *Thomas Powys* hath done. There are several Things offered in Evidence which are new to us Lawyers. We do not desire time on behalf of the Prisoner by way of Delay; but in respect of the newness of the Matter and the length of the Proceedings, and that we may make that Defence that is incumbent upon us in discharge of our Duty to the Prisoner.

Mr. Speaker.

Mr. Speaker. Gentlemen, you must withdraw.

And being withdrawn.

Mr. Smith. I would not give an opportunity to any Man to practise with Witnesses, to hinder the Truth of the Matter appearing, after they have heard the Evidence for the Bill. I would know what List of these Witnesses Sir John Fenwick hath given in?

Mr. Speaker. You did make an Order, That Sir John Fenwick should deliver in a List of his Witnesses; but I believe he did not send any List to any Body upon that Account, for I have made no Order for any.

Lord Coningsby. I am convinc'd that you are oblig'd to sit so long as to hear the Witnesses on both sides; and therefore my Motion is, to call in the Counsel, and ask them, if they have any Evidence to produce, but I do desire the Counsel may not go on to make their Observations to Night.

Sir Walter Young. I think you are rightly mov'd by that Noble Lord that spoke last. I think if Sir John Fenwick hath any Evidence to produce, he ought to produce it now, and that you ought not to give him time till to Morrow Morning to produce that.

Mr. Speaker. Is it your pleasure that Sir John Fenwick, and the Counsel, be call'd in, and told That the House do expect, if they have any Witnesses, that they do Examine them to Night, but as to their Observations the House will give them Time till to Morrow Morning.

Which was generally Consented to, and they were brought in again.

Mr. Speaker. Sir Tho. Powys, the House have Consider'd of what you said, when you went out, and they are inclin'd to Allow you Time for making your Observations; but they have Commanded me to ask you, Whether you have any

any Witnesses to produce ? And to let you know, That if you have any Witnesses to produce, they expect you should produce and examine them to Night.

Sir Tho. Powys. Sir, I would acquaint you with all the openness that becomes me on this Occasion. I must confess, we have not any Witnesses that we propose to call ; but when we come to speak to the Matter, we hope to give you some Satisfaction as to that ; but at present, we have no Evidence to produce, unless it be a Copy of a Record.

Mr. Speaker. Sir, if you please to withdraw, you shall know the sense of the House.

Accordingly they withdrew.

Mr. Chanc. of the Excheq. I suppose since the Gentlemen have no living Witnesses to produce to Night, you will not think fit to receive them at any other Time, for 'tis giving them too much Advantage ; and the whole Meaning of the *Chicane* of the Counsel, is only to get Time to Reply, Mr. D. having heard the Evidence. And now I have mentioned him, give me leave to tell you, That I think you can't rise without taking some Notice of him. I think there is as plain a Subornation prov'd in D. as can be, by one *Rowe*, and when you have heard such a Character of a Man, and there is no other Evidence that he can Solicite, I think you ought to take care, that he be forthcoming, and that he should be taken into Custody. I think you may give the Counsel farther Time. As to the Record, that can't well be falsified, though I believe in a matter of this moment, where the Government is concern'd, there never was such a Proceeding by the Counsel, as this has been to entertain us 6 or 8 Hours together, by Delays.

Mr. Smith. I suppose before you hear any Thing as to D. you will do something as to the putting

putting this Cause off to another day, I humbly propole that you will go on this again on Wednesday.

Sir H. Hobert. When 'tis proper to go upon Ways and Means, I shall come into it : But while this is upon your hands, I believe you will never get heartily into other Business : And therefore I humbly move you that you will go upon this to Morrow Morning.

Thereupon the House came to these Resolutions.

Resolved, That this House will proceed farther in Relation to this Business of Sir John Fenwick to Morrow at Twelve a Clock.

Ordered, That Sir John Fenwick be remanded to Newgate, and brought again to the House to Morrow at Twelve a Clock.

Ordered, That the Bill be Read a Second time to Morrow Morning.

Mr. Russel I am unwilling to trouble Gentlemen at this time of Night : But I would know, Whether, when Sir John Fenwick is called in, you will ask him any Questions upon that Paper?

Members. No, no.

The Counsel were called in, and withdrew again.

Resolved, That this House being informed that the Counsel for Sir John Fenwick have no living Witnesses to produce, except to prove a Record, that this House will not bear any Witnesses, unless in relation to the said Record.

Ordered, That Mr. Dighton Memorandum it was do Attend to Morrow Morning. half an hour after Ten at the time of the Adjournment.

Adjourned till to Morrow Morning Twelve a Clock.

Martis 17. die Novembris, 1696.

Ordered, That the Sergeant do go with the Mace into Westminster Hall, and the Courts there, and the Court of Requests, and Summon the Members.

bers there, to Attend the Service of the House immediately.

Sir *John Fenwick* and the Counsel of both sides were called in.

Mr. *Speaker*. Sir *Tho. Powys*, you that are of Counsel for Sir *John Fenwick*, the House Agreed last Night, to give you time till to Day to make your Observations upon the Evidence that hath been given.

Sir *Tho. Powys*. Mr. *Speaker*. I am of Counsel for Sir *John Fenwick*, who now stands before you upon the greatest Concern he can have in this World; and as you have been pleased to Assign us to be of Counsel for him, and I must own have very favourably heard us hitherto, so I shall think my self very unfortunate if I shall let fall any Expression in his Defence, that shall seem indecent, and give Offence to this House, for I am sure I have no intention to do it; but on the contrary to behave my self with all the Deference that is possible, in a Case of this Nature.

The things I shall insist upon, will be upon Three Heads,

First, The Manner of Proceeding, and Method that hath been taken in this Prosecution.

Secondly, I shall take notice of those things that are alledged against him in the Bill, upon which he is to make his Defence.

In the *Third Place*, I shall beg your Favour, to Observe what sort of Proofs they have offered on the other side, and which they call Evidence.

As to the *First Matter*, I must intreat the Favour of you to be thus understood, That when I say any thing in Relation to the Manner of Proceeding, I do not speak in Opposition to the Power of Parliaments; for I know very well, that our Lives and Estates, and all that we have, are subject to Acts of Parliament; but I hope you will permit me to offer some Reasons, which (I hope) may be of weight, in Opposition to the

the Exercising of that Power in the way you are now going. No Body can say, but when an Act of Parliament is passed, though the Party concerned may think it was upon hard Terms; yet when it is become a Law, it is not to be Opposed. I can't say, but those Persons, who in the last Sessions of Parliament, were Imprisoned by an Act *Ex Post Facto*, and subsequent to the Fact Complained of, yet when it was passed into a Law, they were Legally Detained: but, I hope, I may take notice of their Case, as some kind of Reason against this, to the end that those Laws may not grow familiar, that they may not easily be obtained; because Precedents generally grow, and as that Law *Ex Post Facto*, extended to Liberty, so this extends to Life: one Precedent is apt to beget another; and therefore sure you will be careful how you give Precedents, especially in Case of Life.

The *First* Thing I Observe is obvious, That is, the Person who is to be Sentenced by this Bill, is forthcoming, in Order to be Tryed in the Ordinary Method of Justice. He is not only Indicted, and actually under Process, but he hath Pleaded, and he is ready when his Majesty in the Course of Justice shall call upon him to undergo his Tryal; and either there is sufficient Evidence, legal Evidence against him, as the King's Sergeant insisted there was, and if so, then, under favour, there is no Reason but he should have the Benefit of an Ordinary Tryal, which is the Birth-right of all the King's Subjects; or there is not sufficient Evidence against him, and if there be not, it will be a good Reason against making a Particular Law for taking away his Life: For, we think, nothing can be said for this Bill but want of Evidence, and that, to my understanding, is a very odd Reason.

L

Sir

Sir, I would not spend the time in taking notice, That the meanest Subject is Entitled, by being born in this Kingdom, to be Tryed by a Jury, where there are those just Advantages that can't be had in another Case: There is a Liberty of Challenging 35, without shewing any Reason, and as many more, as he can any way Object to, with Reason. The Witnesses are upon Oath, and all the Proceedings are by certain known Rules and Methods, not only by the Statute of *Magna Charta*, but by the Common Law of *England*, much more Antient than that Statute; and though the Proceedings therein, are such as a Criminal may sometimes escape; yet the just Advantages are so much beyond any thing of that Nature, that I hope we shall never complain of that Antient Course of Proceeding by Jury. I am sure it is the Honour of our Government, the Mark of our Freedom, and Envy of our Neighbours, and, I hope, that Method of Tryal shall never be laid aside, though sometimes it may not have the effect that is desired by it.

I would take notice to you. That in a Case of the greatest Crime, and most Notoriety of Fact, yet the Persons concerned in it were brought to their Tryal. The Regicides, who did not fly; but were found upon the Restauration of King *Charles II.* though their Treason had the worst effect even in the Murther of the King; yet notwithstanding, though the Fact was so notorious, those that were found upon the Place were admitted to their Tryals in the ordinary Course of Justice, although at the same time there was a Bill of Attainder against some that fled, and some that were dead, and so could not be Tryed.

I would, with your Favour, likewise observe, That the Parliaments of *England* have been so far from depriving Persons of their ordinary Tryals, that whereas the Common Law of *England* says, that
Persons

Persons Out-lawed for Treason and Felony, if taken, shall be put to Death without Tryal, yet the Parliament, in the Reign of *Ed. VI.* made a Law, providing, That Criminals that returned within a Year, according to that Act, should be admitted to their ordinary Tryals.

Sir, all along, the Statutes run in favour of Tryals. There are no less than Two Acts of Parliament in the Reign of *Ed. VI.* in the First and Fifth year of his Reign, That say, There shall not be less than Two Witnesses against any Person for Treason: And I hope I shall never see a Law made so much in Opposition to those Acts, as that a Person shall be sentenced to Death without so much as one Witness, as I shall shew by and by.

Perhaps it may be thought Extraordinary, that in this same Parliament that passed a Bill for regulating Tryals in Cases of High Treason, requiring two Witnesses with great strictness, and giving further Advantages to the Criminal than ever were before allowed, An Act should pass to put a Person to Death, without any Tryal at all. And let any one compare the Preamble of that Act with this Bill.

Sir, I take it, with humble Submission, That the present Case is not at all to be likened to most of those Bills of Attainder that may be Cited; those, when they come to be looked into, will be found either to have passed against such Persons as fled from Justice, and therein they only pursued the Rules of the Common Law, which allowed them to be Outlawed, and by Consequence to be Attainted, and the Parliament therefore, in Attainting them, did but the same Thing, and therein there was nothing done Extraordinary. True it is, That where Persons have been forth-coming, there have been some few Bills of Attainder: But I will presume to say, they are never mentioned

without heavy Censures, and a great Complaint against them.

This Case is not like the late Instance of the Bill of Attainder against the Duke of *Monmouth*; for though he was present in the Kingdom, yet he was in direct Opposition to any Method of Tryal, he was in Defiance to all Courts of Justice: But here is a Person who submits himself, and hath Pleaded, and stands ready to be Tryed, and, I hope, I may take notice, to take off all Prejudice that may be raised, That this Gentleman, though he was of the Parliament that passed that Bill, yet he was not in Town, till at least a Month after the Bill was Passed.

I do Agree, there are some Cases where Persons have been Attainted without being admitted to be Tryed. In the beginning of the Reign of *Ed. III.* *Roger Mortimour* was Attainted, and Executed, without being Tryed; but 28 *Edw. III.* it was Reversed, because he was not brought to Judgment according to the Law of the Land, 1 *Edw. III.* The like in the Case of *Edmund* Earl of *Arun-*
del: But 4 *Edw. III.* *Richard* his Son, Petitioned in Parliament, setting forth the Proceedings to be against the *Great Charter*, and insisting, That there ought to have been due Process of Law, and he was then restored in part; but 28 *Edw. III.* there was an Act of Reversal, Declaring, That it clearly appeared, that the said *Edmund* was unduly put to Death, and that the Statute by which he was Attainted, was Void, Erroneous, and Null. There is an Instance in 32 *H. 8. Co. 4. Inst. fol. 37.* of *Thomas Cromwel* Earl of *Essex*, who, though he was in Custody in the *Tower*, yet he was Attainted without being Tryed: But the Words of my Lord Coke, are as follow, *Auferat oblivio, si potest, si non utcumq; silentium tegat.* For the more High and Absolute the Jurisdiction of the Court is, the more Just and Honourable ought it to be in its Proceedings, and

and to give Examples of Justice to Inferiour Courts. And he adds further, to the end, as I apprehend, That the Rehearſal of this Attainder may be of no ill uſe : I am, ſays he, confidently perſuaded, ſuch Worthy and Honourable Members, ſhall from time to time be of both Houſes of Parliament, as never any Attainder, when the Perſon is forth-coming, ſhall be had hereafter, without hearing of him : Which I underſtand to be, without Trying of him ; and 'tis memorable, what my Lord Coke recites, That he, who thus died, attempted the like againſt another.

There is another Caſe of *Thomas Seymour*, Admiral of *England*, who likewise was Attainted by Act of Parliament, and as it appears, without Execution. You have an Account thereof in the Second Part of the *Hiſtory of the Reformation*, fol. 98, 99, 100. whither I will refer you, only to read the Sentence of the Learned Author, there Pronounced againſt it. The Latter Caſe is, that of my Lord *Strafford*, which every Body knows. I ſhall, as the beſt Account of that Matter, crave leave to read the Words of the Parliament in the Act of the Reverſal. I will not trouble you with reciting the whole, but only read the beginning, and ſome part thereof in another place. *Whereas Thomas, late Earl of Strafford, was Impeached of High Treason, upon pretence of endeavouring to Subvert the Fundamental Laws, and called to a Publick and Solemn Arraignment and Tryal, before the Peers in Parliament, where he made a particular Defence to every Article Objected againſt him ; inſomuch, That the Turbulent Party then ſeeing no hopes to effect their unjuſt Deſigns, by an ordinary Way and Method of Proceedings, did at laſt reſolve to Attempt the Deſtruction and Attainder of the ſaid Earl, by an Act of Parliament, to be therefore purpoſely made to Condemn him upon Accumulative Treason*——And then it goes on to ſhew, it was carry'd by the Tumult of the People, and

then follows — *And to the end that Right be done to the Memory of the Deceased Earl of Strafford aforesaid; Be it further Enacted, That all Records and Proceedings of Parliament relating to the said Attainder, be wholly Cancelled and taken off the Fyle, or otherwise Defaced and Obliterated, to the intent the same may not be visible in after Ages, or brought into Example to the Prejudice of any Person whatsoever.* So that the Parliament that Enacted that Reversal, did Consider those Proceedings as very Evil and Unjust, and was not willing there should be any Remains of such an Example to future Ages.

Sir, having made these Observations as to the Manner of Proceeding I come now to that which is the Subject Matter of the Bill at present before you, and which we take to be the Charge against Sir John Fenwick: I must crave leave to Observe, That in all Courts of Justice, where any Person is Accused, he is to make his Defence *Secundum allegata & probata*: 'Tis not enough that a Matter is proved, if it be not alledged; nor that it is alledged, if it be not proved: But if it be both alledged and proved, then it is a full Charge, and requires an Answer. It is not only the Law of England, but I believe, of all Nations, and where ever any Person is to make his Defence, especially in Capital Crimes, that to which he is to Answer must be alledged against him, from whence I shall Observe what is alledged against Sir John Fenwick, for, I hope, we are not concerned to defend him further than as to what at this time he is Charged with. This Bill of Attainder, as it is drawn, and now stands before you, doth not so much as alledge, or say, That Sir John Fenwick is Guilty of the Treason whereof he was Indicted, and that hath prevented us from producing Witnesses to that, and several Matters which the King's Counsel have entered upon: For though you have permitted them to Examine Witnesses to several things quite out of the Bill;

Bill; yet, I hope, you are not come to any Resolution, That these Matters shall be thought fatal to Sir *John Fenwick*, that are not so much as alledged against him. We do not therefore think we are bound, or ought to follow them in those things that are totally out of the Bill; and therefore his being Guilty, is not now the Question, because 'tis not a Charge upon him.

The first thing that is alledged in the Bill is, That Sir *John Fenwick* was Indicted at the Sessions, for that which is laid in the Indictment to be Treason (by and by I shall crave leave to be heard to) and, I think no Body will say this alone does require any Answer, further than to own the Fact or deny it: And we do Admit that he was so Indicted. I need not labour much to clear him of the Consequence of that alone; for very often Innocent Persons have been Indicted and Accused, (for an Indictment is no more than an Accusation) and this Bill, as I have observed, doth not say he is Guilty. When the Bill hath recited that Matter, it proceeds to take notice, That he by some unfair Prevarications (for so I agree they were, if the Facts alledged in the Bill are true, which by the way hath not been yet proved, by producing any one Witness) did obtain the King's Clemency to put off his Tryal, in expectation of an ingenuous Confession, which the Bill takes for granted he hath prevaricated in, by Charging several Persons of Honour and Fidelity with Matters of a high Nature, only by Hearsay, and by using other unfair Artifices to put off his Tryal. How far it is made out, that I must submit to you, we think at present there is no proof of it, and by Consequence we are not concerned to answer it: But had they proved it as fully as it is laid (though far be it from me from excusing such a Behaviour) yet when a Criminal is to be Tryed for that which

will be of fatal Consequence to him if he be Convicted, no Body can say it comes near Treason, by unfair means, to contrive to put off his Tryal.

The next Thing the Bill recites is, That one of the Witnesses who might have been produced against him upon his Tryal, if it had proceeded as was intended, is since withdrawn. I can't say, but *Goodman* is withdrawn: But as the Bill does not so much as alledge, That it was by the Means or Procurement, no nor Privy, of Sir *John Fenwick*; so from thence that part of the Bill Charges no Offence home to Sir *John Fenwick*: For in Case the same Witness had hapned to have dyed by the Act of God, It would not have been said to have been a good Reason for this Bill of Attainder against Sir *John Fenwick*, unless he had contributed to it.

From these Premises follows the Enacting part, That Sir *John Fenwick* be Attainted of High Treason; and in future Times the Act must be supposed to be grounded upon the Inducement to it. And I humbly submit it to you, Whether this Bill Condemning him for High Treason, upon such Recitals, will be thought to be reasonable?

These being the Allegations of the Bill, I will now, with your Favour, come to that which they on the other side do call Proofs; and I must humbly observe to you, and submit it to your Judgment, Whether in a Case where a Man's Life is to be taken away, by a subsequent Law made on purpose for him, the Proofs in that Case ought not to be much more Evident, than if he were to be tryed by a Law already in Being? In my poor Apprehension (I speak it with all Submission to you, Sir,) It would be too much at once to make a subsequent Law to condemn a Man to Death, and to do it upon doubtful and uncertain Evidence, or rather upon no Proof at all. Nothing could Excuse such a Law,

Law, but an undeniable Proof of the Fact. And therefore surely the Position we find of *Mr. St. John's*, in my Lord *Strafford's* Case, is of most dangerous Consequence. I am afraid none are safe if that be admitted, That a subsequent Law may take away a Man's Life without any Evidence, other than the private Opinion or Conscience of every particular Law-maker. He is pleased so to assert, That it may be done as in *Rushworth's* History of that Tryal, fol. 677. I am sure if this be so, no Man knows how long his Life is his own: I hope this Doctrine shall never be followed or approved. Sir, we have the Happiness to live under an Establishment that every Man does, or may know the Law he is to go by; Every one is bound at his Peril to take notice of the Laws, and to act accordingly, because they may be known, but at this Rate none but Prophets can live among us.

In the next place, I would observe what Course they have taken in their Evidence who are the King's Counsel.

First, They have betaken themselves to that which is not Alledged in the Bill; and we think that is not agreeable to a Course of Justice.

In the next place, to make out that they insist on, they have produced but one Person that comes hither *Viva Voce* to speak to it; and I must take Notice to you, That he is not upon Oath. I know very well it is not your Course in this House to administer an Oath; yet, I hope, that is so far from being a Reason why this Bill should pass here, without an Oath, that it is a good reason why such a Bill should not begin here. There is no Place in the World where a Person is sentenced to Death without an Oath. In the Case of my Lord *Strafford*, the Proceeding first was by way of Impeachment, and the Witnesses had been first examined upon Oath in the House of Peers, and that Bill of Attainder

der takes notice of it, reciting that it had been fully proved, and by Consequence, we may suppose that they would not otherwise have passed it, that being the Ground of their Proceeding upon that Bill of Attainder: But for the Bill to begin Originally in this Place, to form such a Judgment, the Heaviest that can be pronounced against a Man, a Judgment of Death, corrupting of his Blood, and forfeiting all he has in the World; and this upon bare Allegations, without so much as the Sanction of an Oath, is extreemly hard. Mr. *Porter* is such a Person, that I know not how he hath gained so much Credit, that this Act should pass upon his Parol to take away the Life of a Man. He was lately of that horrid Conspiracy for the Assassination of the King; and shall that Man who was so lately of that villainous Disposition to be engaged in a Crime of that Black nature, and not Convicted by his own Conscience, but by the Danger he had run himself into, not so much as Pardoned his Crime, but at this time, if I may without Offence use that Expression, Drudging for his Pardon, I say shall this Persons Life be taken away by his Parol?

Sir, the next Thing I would go to, is that (which likewise they call Evidence) which is an Examination, as they term it, of *Goodman*, taken before a Justice of Peace: But he was not Examined, and I must insist upon it, That though you permitted it to be read, yet I did observe you did not declare it to be Evidence, but you were, I presume, willing to hear all Things, and then judge what would be Evidence. And, I think, the King's Counsel did not press it further. Sir, as this is not Evidence that would be allowed in an inferior Court, so I hope, you will not allow it to be Evidence here; for then it is like to be followed by other Courts, who observe the Proceedings here as their great Rule. 'Tis only what

Mr. *Goodman*

Mr. *Goodman* thought fit to write down without being Examined.

Sir, the next Thing they resort to, is, What *Goodman* Swore upon his Examination in another Cause where Sir *John Fenwick* was neither Party, nor Present. Sir, there are, I suppose, such Reasons against that sort of Evidence from natural Justice, that it is not admitted in any Court; because there may be a weak Defence, or the Person that swears it against one, perhaps may not, when Face to Face, have the Confidence to persist in it, in Case it be false against another, or at least that Person, who was not a Party before, when he comes upon his Tryal, may think of such Questions as may go a great way to discover the Truth, may produce such Evidence against his Credit as may overthrow it.

But if what is Sworn at one time against one Man must be always taken for Truth against all others, the Tryal of one in the Company is the Tryal and Condemnation of all the rest. And how contrary is this to a fundamental Rule in our Law, That no Evidence shall be given against a Man, when he is upon Tryal for his Life, but in the Presence of the Prisoner; because he may cross Examine him who gives such Evidence, and that is due to every Man in Justice.

But I would with Submission inquire, How they are sure that *Goodman* would have sworn this Matter again, if he was now forth-coming? Because he did swear so in *Cook's* Cause, is it necessary that he would swear so again now, if Face to Face, with Sir *John Fenwick*? No Body can say so positively and absolutely; they only can imagine it, because he once swore it, therefore it is probable that he would do so again: Whereas, we may as well say, he did then swear it to save his own Life, and having done that and found an Opportunity to get out of the

the way, his own Conscience put him upon flight, to prevent his doing of it again, and that might be the Reason for the withdrawing of himself. However, I insist upon it, That there is no Proof that it was by the Procurement of Sir *John Fenwick* that he withdrew. The Bill does not alledge it, and the Proofs do not come up to it : Nay, there is nothing offered to such Purpose, save, only that *Mr. Porter* was pleased to say, That another Man told him, that the 300 Guinea's he was offered, and 300 more he was to have received, were to have come from Sir *John Fenwick* : But hearsay Evidence is to be rejected, especially against a Man for his Life, because every Man is at Liberty to talk at large : But God forbid that that should be allowed for Evidence.

The next Thing they went upon was what *Mr. Roe* said, That *Mr. Dighton*, who by your Permission is Solicitor for Sir *John Fenwick*, was inquiring of him what he could say to take off *Goodman's* Evidence : The Words I think he used were, What he could say to discredit *Goodman's* Evidence, and, I hope, that does no way affect Sir *John Fenwick*. For it does not appear that he had therein any Authority from him ; but 'tis only suspected, because he is now Solicitor for him, which he was admitted to after the time spoken of. But I take the Words to be nothing relating to *Goodman's* withdrawing of himself ; but to enquire what he could say to discredit his Testimony, which supposeth he would appear, and imports the quite contrary of withdrawing himself : And if he had gone no further, I think, there had been no Fault in that ; for any Solicitor may enquire up and down for the Advantage of his Client, and the Word *Solicitor* imports his Employment. As to the Offer *Mr. Roe* says he made him, of a very great Recompence, How far he is Guilty of that, I suppose, he can give

give some Account, if you should please to enter into the Examination of it, and as I find he does not doubt to clear himself: so that Sir *John Fenwick* is in no sort proved to be privy to *Mr. Goodman's* withdrawing himself, much less to have had a Hand in it.

There is one Thing more I would offer, and that is Grounded upon the Bill of Indictment preferred at the *Old Baily* against Sir *John Fenwick*, That the Matter in the very Indictment that they have Read on the other side, as it is there laid, and as far as it hath been offered to be here proved, does not amount to Treason; or, at least, it hath been made a very great doubt, and by some within these Walls: But this I offer, with all Submission, I have the Author in my Hand, who is a Person of Note of the King's Counsel, he hath furnished me with such Arguments as, I hope, I may be admitted to put you in mind of without Offence.

The Indictment lays, That there was a Conspiracy and Agreement to call in Foreign Power, and to that purpose to send *Charnock* to *France*; but the Indictment does not say, That *Charnock* was sent, only that there was a Meeting, and an Agreement, and a Conspiracy, to send him: So the Indictment does not Lay it as a Thing done, nor does the Bill Charge it so; but only takes Notice, That he, I mean Sir *John Fenwick*, was Indicted for Conspiring and Agreeing to call in a Foreign Force, so that this Bill does not say that *Charnock* was sent. And I appeal to you, Whether it be proved that he was sent? For *Mr. Porter* says no more, But that there was a Meeting at the *King's-Head*, and he named Sir *John Fenwick* to be one who was present; and there it was, he says, agreed, That *Charnock* should be sent into *France*. Now, if there was nothing more than an Agreement and Conspiracy

spiracy to do it, and no further Act, but such a Meeting to do it, but the Person was not actually sent, or at least, not proved to be sent; then, from this Learned Author's Opinion, I insist upon it, That this is not a sufficient Overt-Act of Treason. In the late Case of my Lord *Russel*, whose Innocency is vindicated by this Author, he takes notice, That a Conspiracy or Agreement to Levy War is not Treason, without actual Levying War; and of that Opinion was my Lord *Coke*, and my Lord Chief Justice *Hales*. A Conspiracy or Agreement to call in Foreign Forces, unless actually done, or a Person, at least, actually sent, or something more than a bare Agreement for that Purpose, is the same as a Conspiracy to Levy War. And in the Case of my Lord *Russel*, the Proof being only, That he, and others, met together, and agreed to seize upon the Guards, and Levy War, which he never actually did, it is insisted upon by this Author, That that was not Treason; for that Indictment went no further. And therefore my Author says, Show me where such an Accusation was ever agreed to be more than a Conspiracy to Levy War? And that such a Conspiracy was ever agreed to be Treason within the Statute of *Edward*. 3. till within these few Years.

Sir, now I must humbly submit it to you, Whether this be any Thing more? And for the purpose you will please to consider, What this present Bill in Parliament, and what that Bill of Indictment recited in it is: For it is not, that *Charnock* was sent into *France* to solicit Foreign Forces; but only that Sir *John Fenwick* was at a Meeting, where they did agree so to do. Calling in Foreign Forces is Levying War, but Conspiracy to Levy War is not Treason, unless it be actually done: A Conspiracy to call in Foreign Forces is nothing more. And therefore I hum-

humbly insist upon it, That neither by this Bill or by the Indictment recited in it, or the Proofs offered before you, any Thing is Charged, but only an Agreement at that Meeting mentioned by Capt. *Porter*, a single Person, and he not upon Oath, to call in Foreign Forces. For he only says further, That *Charnock* told him he had been in *France*. I shall not trouble you any further; we have not thought fit to produce Witnesses, for the Reasons I have offered: For that we do not find, that Sir *John Fenwick* throughout the Bill is Charged with being Guilty of Treason, and we are not willing to enter upon the Defence of a Matter not Charged upon him. I hope, Sir, you will not make a Precedent, That where a Person is Indicted, and ready to abide his Tryal in the ordinary Course of Justice, as Sir *John Fenwick* now is, that he may be taken out of the Hands of the ordinary Judges, and be brought to this Bar, to receive his Tryal here.

A Matter of this Nature may be of very great Consequence: We know at present upon what Ground we stand, for by the Statute of *Ed. 3.* we know what is Treason; by the 2 Statutes of *Ed. 6.* and the late Act of Treason we know what is Proof; by the Statute of *Magna Charta*, we know how we are to be tryed *per legem terræ & per Judicium Parium*, That is, a Peer by his Peers, and a Commoner by a Jury; but if Bills of Attainder come into Fashion, we shall neither know what is Treason, what is Evidence, nor how, nor where we are to be tryed. Sir, I submit it to you, and hope this Bill shall not pass.

Sir *Barth. Shower*. Mr. Speaker, Being of Counsel for Sir *John Fenwick*, the Prisoner at the Bar; I am first humbly to thank you for your Candour, of which I have had frequent Experience; and humbly beg for my self, That if I offer any Words that are indecent, or unfit for me, that you

you will interrupt me, for it is furthest from my Intention so to do.

The Bill that is brought into this House against Sir *John Fenwick*, is that whereby every one of you (with Submission) are to Declare and Pronounce, *That he shall be Drawn, Hanged, and Quartered, as a Traytor.* And the Question before you is, Whether you will do this in this Case?

Sir, I shall not pretend to question, nor enter into any Debate or Argument in this thing concerning the Power of Parliaments: No question, but in all Governments, there is some Supream Power; and by our Constitution, it is lodged in the King, Lords and Commons.

There are Precedents of Attainders, and those many; but can they shew me, where there hath been any Attainder by Parliament, for High Treason upon one single Act. Which if Treason, was Determinable at Common Law, There have been Bills of Attainder for Flagrant Treasons, committed by Great Ministers of State, some Topping Sinners, who have been above Judges and Jury, and whom Inferior Courts could not deal with: But I believe I may say this, That for a private Consult or Agreement between four or five Private Gentlemen, in a Private Room, from which there was no Danger, but by the Consequence of the Resolution of it when put in Practice, no Man can shew any Precedent for Attainting any Person in Parliament.

Sir, If you please to observe, the 25 *Edw. 3.* reserves the Power to the Parliament, to proceed in Treason not expressed within the Statute; but as to the Compassing the King's Death, adhering to the King's Enemies, and those things that are there particularly specified, it seems the Sense of that Parliament to leave them to the Rules of the Common Law. So 1 *H. 4. No. 144.* on the Parliament Rolls, it is at large Complai-
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ned' of Accusations in Parliament for Treasons and Felonies, and it is Declared for the future, They should be Determined in the Inferior Courts.

This was occasioned by Sir Ra. Ferriers. Cotton's Abridgment, 189.

There is a Melancholy Precedent or two of single Acts of Attainder ; but they are most of them Reversed. Sir Thomas Haxey in Rich. the 2d's time, was Attainted for bringing in a Bill into the Commons House against the Prerogative; but 1 H. 4. it was Reversed with great Censure, Cott. Abridg. 362, 363. There are others in H. 8. time, but they were for Acts in that Reign, which were questionable, Whether or no within the Statute of Edw. 3. and were for such Actions, as perhaps were not for the honour of the Prince, or good of the Government, to disclose by Publick Tryal, as the Attainder of the Queen, and others concerned.

I beg leave to repeat the Words of a great Author, the Bishop of Salisbury, in the *History of the Reformation*, which I crave leave the rather to do, because it hath been approved of by this House, for he had Thanks of the Parliament for it ; Fol. 359, 360. where speaking of these sort of Attainders, he says, *After these Executions, followed the Parliament in 1539. in which these Attainders were not only Confirmed, but divers others were made of Persons in Custody, without bringing them to Tryal ; (and he says) which can't be enough Condemn'd as a breach of the most Sacred and unalterable Rules of Justice.*

That of the Marchioness of Exeter, &c. I shall make no Paraphrase upon it but submit it to your consideration : There is no question but you will Agree, and I must Admit. *Salus Populi* to be *Suprema Lex* ; but for an Act, not the last May, but last May was Twelve Months, the danger
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passed

passed, the Persons Executed that were Concerned in the Great Treason, and all danger that might have been from that Act gone, and no fear now concerning it, I hope you will not use the extraordinary Power of the Legislative to punish it.

The Reason suggested in the Bill is, That 'tis impossible to have this Gentleman Tryed by the Rules of the Common Law, for otherwise there is none, For you will not waste your time. And if the Doctrine that was broached here yesterday, be true, there is no occasion to trouble you now; for according to their Doctrine, there is legal Evidence, and there is no need of a Bill of Attainder: but taking that for granted, that we must do (otherwise there is no Reason for this Bill) Then the Bill says, That *Goodman* was an Evidence, and that he is withdrawn; which I must observe, is neither laid nor proved to be by the Privy, Consent, or Procurement of Sir *John Fenwick*: There is no pretence of it in the Bill, no Insinuation of it, nor any Evidence to that purpose. Then suppose *Goodman* is withdrawn, we may presume you will not pass a Bill to put Sir *John Fenwick* in a worse Condition than if *Goodman* was present, if he had been ready to have Sworn the same thing.

In case you do pass this Bill, you do put Sir *John Fenwick* in a worse Condition than he would have been if *Goodman* were here. Perhaps it might be reasonable to have an Act passed, That *Goodman's* Depositions should be Read at the Tryal, if *Goodman* was withdrawn; but we hope it can't be a Reason to Condemn Sir *John Fenwick* of High Treason without Tryal; for the Consequence of this is (if it were by his means) that he is Punished greater than the thing requires. For if *Goodman* was here, Sir *John Fenwick* would have had his Tryal by a Jury, the Benefit of Challenges, Exceptions

Exceptions to the Array, might have Challenged upon Account of Favour, if any of the Grand-Jury had been Impannelled, had his legal Exceptions to the Testimony of the Witnesses, might have these Witnesses Examined upon Oath, might give Evidence upon Oath in Answer to it, and all this he is deprived of : So that now he is in a worse Condition by *Goodman's* Absence than if he was present. We insist upon it therefore, and submit it to you, whether any Punishment shall be Imposed by the Legislative Power, but only to supply that Defect, and put the Case in the same Circumstances it would have been, if such a Miscarriage had not been Committed. But this Bill is to condemn him to Death upon the Oath of one Witness, tho' your Act of Parliament last Year requires two. With submission to their Judgment, it was the Law of the Land, before that, and 'tis the Law of God, and the Law of the whole World, and no Law allows a Man to be Condemned but by two Witnesses; and the Reason that here in other Cases one Witness is Admitted, is because the Party hath the Benefit of a Jury, and Challenges to them, who the Law supposes are privy to the Fact, and therefore are to come from the Vicinage, from the Neighbourhood of the place where the Party dwells. And for that Reason, in Cases of Felony where no Statute interposes, the Law allows but one Witness. Natural Reason requires two Witnesses in case of so great Crimes, because that one Witness can be no Rule to guide your Judgments. One affirms, the other denies, this is equal, and Presumption ought to be on the side of Innocency, rather than otherwise. But we hope, in this Case, it will not be thought reasonable to pass the Bill to Condemn Sir *John Fenwick* for Treason, and to Condemn him to the basest of Executions,

cutions, upon the Testimony, nay upon the Parol of one Witness. And 'tis no more than if *Goodman* had been dead, then you would not have done it. If *Goodman* and *Porter* had both come to this Bar, you would not have done it, but have referred him to his Tryal at the Common Law: Now what is there pretended by them to induce you to Judge the contrary, or at least without so much as an Allegation in the Bill, that Sir *John Fenwick* procured his withdrawing. I propose it to your Consideration, Whether there be any Proof, that *Goodman* is withdrawn? He was once in Custody, let out upon Bail, the Prosecutors approved the Bail, he never yet called upon his Recognizance, nay, there is not one tittle of Evidence, but that *Goodman* may be in the same Lodging where he was: And then, suppose when you have passed this Bill, *Goodman* should appear again and contradict the Testimony he has given before, Then it may be too late for you to do right to Sir *John Fenwick*. 'Tis not so much as offered that *Goodman* could not be found, they offered a Printed Proclamation, which I am sure the Kings's Sergeant will not allow to be any Evidence, Whether it passed the Great Seal before it was Printed, or whether it passed it at all, *Non Constat*, for it was not Read, they waved it. It does not appear Sir *John Fenwick* Consented, or Procured *Goodman*'s withdrawing; he could not Procure it, for he was a Prisoner, and so not likely to effect it, being a Prisoner, especially for his Life.

As for my Lady *Fenwick*, whether she did so or not, I am sure you'll be of Opinion, it ought not to affect Sir *John Fenwick*: Suppose *Clanny* a Stranger to Sir *John Fenwick*, and in Truth he never see him; Or suppose him a Friend, and he Officiously did what he did, he ought to answer for it, and I think he hath undergone the

the Punishment the Law thought fit to inflict in that Case, 'tis his own Crime, and by the Rules of Justice, no Man's Crime ought to tend to the Punishment or Misfortune of another Man: The Act of one Criminal, tho' thought to be a Parry, or Acquaintance, or a Friend of Sir *John Fenwick's*, ought not to affect him, nor any body but the Actor, and 'tis he that hath Suffered for it.

And what hath been said in that Matter, ought not to influence your Judgments, for 'tis not improbable, but what *Clancy* told *Porter* is false; you will never allow Hear-say, nor permit your Judgment to be Governed by any thing but what is certain, and hath all the Moral Rules of Persuasion. Hear-say was never by any Law, in any Court of the World, allowed, nor indeed believed in Private Conversation.

As to my Lady *Fenwick*, there is this further, That Husband and Wife, in respect of Crimes, are distinct Persons, and what one does, cannot affect the other, no more than she deserves to be Executed for what Sir *John Fenwick* did. And as to what *Porter* says concerning it, it only relates to himself, it proves no Suggestion of the Bill, which is, that *Goodman* is withdrawn. Because a Stranger to Sir *John Fenwick*, (and it must be so in Construction of Law) made an Attempt upon Capt. *Porter*, therefore *Goodman* being withdrawn, there was an Attempt upon him, and by the same Person, and by the same Means; this, is no Evidence, it carries no Logick in it, and won't prevail upon your Judgment.

We offer another thing to your Consideration. 'Tis said, that one *Roe* was spoke to by a Solicitor of Sir *John Fenwick's*, Whether or no he could say any thing to the Discredit of *Goodman*, as to his Robbing or Clipping. The asking of that Question was Lawfull and to desire him to testify

it was Lawful: I must agree, to offer too great a Sum of Money, may subject him to an Information in the *King's-Bench*, (but Mr. Attorney knows that best) but God forbid it should affect Sir *John Fenwick*: Mr. *Dighton* was not his Solicitor at that time, not appointed, nor had any Liberty to come to him. Besides, it can't be an Evidence, nor can't induce you to believe, That the same Person was Instrumental to get away *Goodman*, because he asked *Roe*, if he knew *Goodman* to be guilty of those Crimes; for there is no Evidence that he asked him or did persuade him to withdraw himself.

There's another thing we could offer to you; There's no Proof of that, which upon the first Reading of this Bill was aimed at, to be Punished with greater pains than the Common Law inflicts, and that is the giving of false Papers and Accusations against great Persons. They have not attempted any thing like it; so that that is to be taken as if there was no such thing. Neither is there any Proof of Protracting his Tryal, by any Promises of Confession or Discovery; they opened it, but did not attempt the Proof of it, but waved it.

But take it to be so; I hope you will not pass an Act to Attrait a Man for making a false Accusation, which only incurs an Action of *Scandalum Magnatum*, or Fine and Imprisonment upon an Indictment; and, I hope, you'll not Condemn him to a greater Punishment, when at the time he did it, he had no notice of that Punishment. The design of the Law, is to influence Men by fear of Penalties, and how can that be, when Penalties are not known at the time the Fact was Committed? I speak with Submission still, it seems not likely, that I should forbear with so much Caution from an Action that exposes me to the Penalty of 20*l.* as from an Action for which the

the Law says, I shall forfeit my Life: Now, Sir, in this Case, it might be expected that he should incur the Penalty of Fine, Pillory, or Imprisonment, but not that he could incur the Penalty of Death.

Then, Sir, as to the Protracting of his Tryal by such Promises of Confession. Certainly the putting off his Tryal, in it self, is so far from being a Crime, that it can't be thought but Lawful; 'tis every Man's Duty, upon the Principle of Self-preservation, and it was at the Liberty of the Government and Ministers to do as they thought fit in it.

In the next place we do insist, That there is no Treason alledged nor proved in this Case, There is no pretence of Truth in respect of the Assassination, or of buying of Arms or Horses, though mentioned in the Indictment. And if Sir *John Fenwick* had been to have been Tried upon this Indictment, and they had both these Witnesses there, all that would have been proved, would have been the Consult, as to the rest, he must have been found not Guilty: And I believe 'tis most notorious, that the whole Company there, could not have raised what was talked of. Now as to this single Act, it hath been said, That a Conspiracy to Levy War is not Treason. My Lord *Russel* was Attainted for it, but that Attainder was Reversed upon this very Account, and the Act declares the Reason of it, he being deny'd his Lawful Challenges, and that by strained Construction of Treason, he was Unlawfully Convicted of Treason. Now the Overt-Act in the Indictment was this, that my Lord *Russel*, and others, did Consult and Conspire to Seize the King's Guards: The Proof of it went further, That they sent Sir *Tho. Armstrong* to view them, and Seize them; But then the Question is, *Whether the Consulting to send a Man to Invite Foreign Forces, is*

any more than a Consult to seize the King's Guards? We say each are Levying of War, and 'tis not within the Clause of Adhering to the King's Enemies; for they must be either present Aiding and Abetting of them; or sending them Money, Arms and Ammunition, and the like; and I think, for that, I may Appeal to your Act made against Corresponding with the King's Enemies, which I suppose, if the Law before was otherwise, it needed not to have been made. Now here is only a Consult, and Agreement to do this Act.

It hath been Questioned, Whether Scribere est Agere, But here 'tis only Mittere? nay, it is not so much, 'tis only Agreare Mittere, Six Men had between them a little Private Discourse, and at last they did agree to send Charnock to France: The Question is, Whether the Law of the Land will Warrant this to be Treason? And if not, then you will not Pass this Act upon such a single Point. Dr. Story's Case is deny'd to be Law. This Case is no more than that in my Lord Dyer for Writing a Letter to invite the Spanish King to Invade England, and it was a time of great fear of them, as it is of the French King now, and he was Attainted upon that, but that Judgment hath been questioned and denyed to be Law. My Lord Hales expressly, in his Pleas of the Crown says, That a Conspiracy to Levy War, is not an Overt-Act of the King's Death, and that Attempting to Levy War is not Treason. The sorts of Treasons are these Three, Compassing the King's Death, Levying War, or Adhering to the King's Enemies, Now for Compassing or Agreeing to Levy War, to apply that to be an Overt-Act of Compassing the King's Death, hath been always complained of as a strain of the Law.

Upon these Reasons, we think this would not have been an Act of Compassing the King's Death

Death as laid in the Indictment; and then if it be but a Question, *Whether it be or no?* We hope you will not proceed in your Legislative capacity, especially when he is deprived of the Advantage of insisting on this at a Tryal at Common Law. Witnesses are there upon their Oaths, he might have had a Challenge to the Jury, he might move in Arrest of Judgment. Now the Question is, Whether you will pronounce Sentence of Death upon him for High Treason, upon one single Act, a Year and half ago, just after the Act of Parliament for Regulating Tryals in Cases of High Treason. If we had had a Tryal at Law, we should have Canvassed these things, and had Witnesses upon their Oaths, for the Pardon reached the 29th of *April*. They could Swear no new Discourse but just in *May*, and now they say it was in the middle of *May*, if it had been before, the King's Grace would have Exempted Sir *John Fenwick* from Punishment. These things we should have had the Advantage of, if we had the Liberty of a Tryal.

There's another Consideration, Sir *John Fenwick* hath Pleaded, and hath Pleaded to Issue, and Issue is joyned, and a *Venire Facias* is Awarded. Now we submit it to you, whether you will think fit to take it out of the Hands of the Common Law, when there is no Extraordinary necessity upon the Considerations we have to offer to you. If you do not cast out this Bill, if we should have the good Fortune as we hope for in another place, Sir *John Fenwick* stands still liable, and must submit to his Tryal, if the King's Counsel think fit to Prosecute him: and we think it hard to undergo your Censure, to be Condemned in this place; and if (perhaps) he be Acquitted here, to undergo the like danger in another, and then to be Tried in a third. And for these Reasons, we hope, you will Reject this Bill.

Mr. *Serg.*

Mr. *Serg. Gould*. May it please you, Mr. *Speaker*, I have hearkened to what these Gentlemen have Objected, but could not be aware of all they have said. They have enlarged upon several Topicks, I shall recollect them as well as I can, and Answer them in the Method they have taken. I never did think, that the Parliament would take things out of the Ordinary Course of Justice, nor Attaint any one of Treason, unless in Cases Extraordinary, and these Gentlemen have Agreed, That in Cases Extraordinary they have done it. They likewise have Agreed, and Sir *Barthol. Shower* has told you, That there are some Treasons by the Statute of 25 *Ed. 3.* reserved to be Declared by Parliament. Sir *Tho. Powys* says, This is taken out of the Ordinary Course of Justice. So says Sir *Barthol. Shower*, says he, Here is an Indictment before you, the Party hath Pleaded not Guilty, and he may be Tryed in the Ordinary Course of the Law, and therefore they look upon it as improper to bring it here.

The Gentlemen are mistaken very much, to think that I did say, That the Examination which I offered as Evidence here, would be allowed below. If I had thought so, I should have thought at the same time, this House would not have meddled with it: But I do disagree with them in this, and take it, That where a Case is Extraordinary, you will interpose. Here is an abominable Treason, that is Agreed on all Hands; Here is Plot upon Plot, here hath been a Plot now to take away the King's Evidence. There were two Witnesses in the beginning, and 'tis very plain that one of them is not here now. For that, here was a Proclamation produced, and, I did look upon that Matter as taken for granted, That *Goodman* was withdrawn, and for that they may be easily satisfied. They say, we have not proved

proved the Suggestions of the Bill; but we think we have. For first of all, Captain *Porter* hath here Sworn it expressly, it is not a thing of loose, bare talking, but he hath proved, a Deliberate and Formed Conspiracy, he hath proved, that it was actually Agreed upon, a first and at a second time, and that *Charnock* was sent in Order to the Execution of it. And what was it for? It was plainly to Depose the King; he tells you, for that purpose they had desired 8000 Foot, 1000 Horse, and 1000 Dragoons from the *French* King, and these Gentlemen Agreed to Joyn them. Now, can there be a greater Evidence of Deposing the King, and consequently of Imagining his Death? 'Tis an Evidence of the Imagination of the Death of the King, as well as of the Rebellion, it being so in the necessary Consequence of it. Now, I think, he hath fully proved that. Then we offer to you, how far you will allow of this Examination: Why? Because upon a second Contrivance, here is a Witness withdrawn, and can any expect greater Evidence of that than we have given? We have proved that there was tampering, let the thing run as far as it will. Captain *Porter* was dealt with, had 300 Guineas in Hand, and 300 more he was to have remitted to him; and was to have 300*l.* a Year, whereof Sir *John Fenwick* was to pay one, and it does follow after that *Goodman* is withdrawn. We must leave it to this Honourable House, what Construction you will make of that, Whether here is not a second Plot?

Now this Matter is brought before this Honourable House. We have gone so far in it, as to produce *Goodman's* Examination that was taken before a Justice of Peace: We have shewed you the Evidence that he hath given upon a former Tryal; and now he is gone, sure no body but
may

may justly infer, 'tis by Sir *John Fenwick's* Means; So that here they have taken away the Evidence that is necessary in the Ordinary Course of Proceedings. In such an Extraordinary Case, I think it hath been usual for the Parliament to interpose: Therefore what they pretended, under favour, that this should not be Evidence, is all taken off. For now we are in Parliament, you will make use of such Informations as can give you any light into the Matter, and may Obviate and Cure the Distemper that is upon us; and you are Judges of your own Methods, and how far Sir *John Fenwick* hath been Concerned upon the Instances we have given you, that is in your Judgments. As for what Sir *Tho. Powys* tells you, That this Power hath not been Exerted by Parliaments very frequently, but it hath generally been done where Persons are withdrawn from Justice, and can't be come at in the Ordinary Course. Why, we are in the like Case, if so be we can't come at Justice in the Ordinary Course, and that happens by our Evidence having been tampered with, and drawn away, and then, Sir, under favour by their own Arguments, 'tis proper to come before this Honourable House.

And as for what they said, That we have not given any Account that Sir *John Fenwick*, by giving Assurance of his Confession, had protracted his Tryal, I did apply my self, That Mr. *Vernon* might give you an Account of it. So that upon the whole Matter, we must leave it to your Consideration, and hope we have given you good Satisfaction, that there hath been a great Plot against the Government, and of this Gentleman's being concerned in it, and there was no Evidence of any other Matter before the Judges, and they allowed it to be High Treason. Here is the same Evidence, only we have not one of them *Viva Voce*.

Mr. *Serg.*

Mr. *Serg. Lovel.* Mr. *Speaker*, I shall not trouble you nor the House very long; but I humbly hope, to satisfy the House, that most that hath been said on the other side, is not much to the purpose. Sir, I will consider, with the leave of this House, what the Common Law was before 25 *Ed. 3.* and how the Law does now stand; and draw some Consequences from thence, and the necessity of this Case.

The Statute of 25 *Ed. 3.* I must observe, it is not an Enacting Law, it is only a Law Declaratory, for all those particular Instances of Treasons that are mentioned there, were Treasons before that Law was made, and so by the Preamble of it, plainly appears: But the Judges had a greater Liberty upon Constructive Treasons, and upon Accumulative Treasons, and that was left too much at the Discretion and Liberty of the Judges below, and the Executive Power of the Law. Then that Statute comes and restrains the Judges in that Point, and says, that they shall not give Judgment in any Cases of Treason, but only in those Cases particularly mentioned there: And that Statute says, That if any other Matter which shall be thought Treason, should come before them, they shall not proceed to Judgment, but acquaint the King in Parliament with it. I only make use of it, to prove how Treason stood before that Act, and how it comes to be altered from the Common Law: And I am sure it is not to be denied, but that one Witness was sufficient at the Common Law. But then comes 1 *Ed. 6. C. 12.* and that for the Security of the Subject, does Ordain, That in Cases of High Treason there shall be two Witnesses of the Fact: But that Statute does not alter the Treason, but was made for the more Security of the Subject in point of Proof. But in that Statute of 1 *Ed.*

Ed. 6. C. 12. That does provide there shall be two Witnesses in Cases of High Treason. There is an Exception of Treason for Counterfeiting and Forging of the Coin; and that is the Reason that the Law is taken now, that though there must be two Witnesses in the Cases of other Treasons, yet in the Case of Coining, there needs but one. The Offence or Crime is never the Greater, because there are two Witnesses to prove it. In this Case that is here before you, We come to desire your help, because one of the Witnesses is by Art and fraudulent Means withdrawn. Does that purge the Crime at all, or lessen it? No Man will say the Crime is less, but it does prevent a regular Tryal before the Courts below; and that is the Reason why we did come here, and we hope this Defect shall be supplied by a special Law. But, say they, 'tis very hard a Law should be made *ex post Facto*, to take away a Man's Life. It would be very hard, if the Case was as they have cited it, to make a Crime *ex post Facto*, that was not so before: But I do not take it to be hard for a Law to be made to Repeal another, to make a Matter Tryable, that was not Tryable before.

Suppose a Law should be made, that all Treasons from and after such a Time, suppose from a Time before the Fact is here supposed to be committed, as *May* was Twelve-Months, should be Tryable as at the Common Law, no doubt the Parliament may repeal a Law in part, or in all. No Man can say, but Sir *John Fenwick* might be Tryed at the Common Law, by one Witness, before the Statute of *1 Ed. 6.* So that I do observe and humbly submit it to you, That the Law, by this Act, is not changed as to the Crime. The Crime is as it was before; it is only changed as to the Number of Witnesses required to prove

prove it. The Instances that have been observed on the other side, with humble Submission, I think do not reach our Case. We do not insist that there are two Legal Witnesses; we do confess the Information that hath been read, is not a legal Proof; but this House, in their Legislative Capacity, is not to be confined to the Evidence that a Jury must have below. This House may take what ways and Methods they please to satisfy themselves. Say they, Here is the Life of a Gentleman that is concerned, I know all good Men will be tender of the Life of a Man, But here is the Life of the King, and the Safety of the Kingdom, the Peace and Safety of us all, that is concerned in the same Case, and let them put these Things into the Balance, and consider which ought to Weigh most.

You have a Record before you of the Conviction of *Peter Cook*, who was Indicted by the same Witnesses.

A Learned Gentleman that is of Counsel for the Prisoner at the Bar, did make the same Objections as are made now at the *Old Bailey*, (it may be there are some other particulars now) and after all the Debates and Argument that could be used at that Time, it was unanimously Resolved, That the Crime was High Treason, and if it was High Treason in *Peter Cook*, 'tis no less in *Sir John Fenwick*, who was present at the same Time, and engaged in the same Business: For what was a Crime in one, was the same in both.

I think 'tis too diminutive an Expression, to say, This was nothing but a little twittle twattle. They did there meet upon a solemn Consultation, and not only once but they did meet a second Time, and what was it to do? It was to invite a Foreign Power to invade this Land, and to make War with the King and Kingdom, and they

they did promise and solemnly ingage to assist them with Armed Forces. It was proved, That they did agree with *Charnock* to go into *France*, and that *Charnock* was not willing to go the first Time he was desired, till he found they were stanch and steady in their Resolutions ; and upon a second Meeting they were all found so, and then he would go : I think that is an Overt-Act of Treason, if there be any. And when he came back, he said, He had been in *France*, and brought an Answer to the Message he went about. This is all now laid before you. But, say they, this is an extraordinary Case, I do agree it, but because 'tis an extraordinary Case, and for the Safety of the King and Kingdom, it is fit there should be an extraordinary Remedy.

They ask, What Mischief it would be, if this Gentleman should be left to the ordinary Course of Law ; It hath been the Wisdom of all Ages to make a Law, to punish such as by their Artifice would evade the Law. Here is this Gentleman, as we say, Guilty of High Treason, but that we submit to you.

This Gentleman was in the Prosecution of the Law, and might have been Tryed in the regular Way, and had the Witnesses upon their Oaths ; (the Grand Jury have found *Billa Vera* upon their Oaths,) but we must appeal to a worthy Member of the House (who because he was a Member we did not call upon) to give you an Account how he did Delay and Protract his Tryal ; and now they know he can't be Tryed below, they pretend he is willing to be Tryed. And because he can't be Tryed, they would have it as an Argument that he should not be punished by any other Means.

Sir, if so notorious a Crime as this is, should be committed against the Body of a Nation, and go unpuni-

unpunished, either in the common Course, or by some extraordinary Methods, the Nation would be in a doubtful and dangerous Case.

When this House hath passed their Judgments in this Matter, it will go to another Place, where it will have another Examination, and it will have that regular Consideration that all other Acts have. We are in an extraordinary Case, and do think, That this extraordinary Case does deserve an extraordinary Punishment.

Sir *Barth. Shower*. I beg pardon but for one Word : No Man does abhor such Consults more than my self ; but I do not think that such Discourses are an Overt-Act of High Treason, as deserves the Punishment of Death.

*Sir John Fenwick and the Counsel withdrew.
And being withdrawn.*

Admiral Ruffel. I think this may be a proper Time to Ask Questions. If so, I think my self enough concerned to trouble you with one or two. I think in the Paper that hath been read, I am mentioned twice. These are the Questions I desire to have asked, What Proof he hath of this? Whether ever he saw, And what Proof he has that I sent Captain *Lloyd* over? And that I gave him a List of the Ships? And that I said, we could not fit out 30 Ships in *May*? And whether or no, since this Revolution, he hath had any Conversation with me?

Meaning *Fenwick's* Informations.

Col. Crawford. What that Honourable Person says, Calls me up. My Name is mentioned in Sir *John Fenwick's* Paper : I desire you would ask him, Why he mentioned me in his Paper, as he hath done? And that you would require him to make Proof of what he says in Relation to me.

N

Col.

Col. Godfrey. I desire some Questions may be ask'd him in Relation to a noble Lord, my Lord *Marlbrough*. If he be Guilty I would have it known, and I would as willingly have it known if he be Innocent, as I believe it will so appear. I would have him asked, Whether since the beginning of this War, or from the Time of this King's Landing, Sir *John Fenwick* did ever speak to him, in publick or private? Or ever did write to him, or receive any Message by Word of Mouth or Letter, from my Lord *Marlbrough*? He says, That some Service he had promised King *James*, which inclined him to promise that Noble Lord his Pardon: I would know what that Service was? And in Relation to his sending *Loyd* into *France*; Whether he can, by any Body else, make that appear?

Col. Crawford. That Gentleman hath put me in mind of one short Question; I desire it may be asked him, Whether ever he conversed or spake with me in his Life?

Mr. Bridges. Whether Sir *John Fenwick* hath any Body but himself, to support the Hearsay he hath given an Account of? And I desire a Question may be asked him on behalf of the Duke of *Shrewsbury*; What Proof he has that the Duke of *Shrewsbury* came into the Office of Secretary of State again, by the Operation and Consent of King *J*—

Mr. Vernon. I desire a Question may be asked previous to that, because 'tis so in Time; How he knows that noble Lord was in Treaty with King *J*. before he went out of the Secretary's Office, when he was first there?

Col. Granvil. I desire he may be asked, What Proof he can give, that my Lord of *Bath* was to betray *Plimouth* into the Hands of King *J*. or the King of *France*, and whatever else my Father is accused of in that Paper?

Mr. Har-

Mr. *Harley*. I humbly propose it to you for the Method of your Proceedings, since you take this Method, Whether it will not save you Time for you to look upon that Paper, and ask him as to the several Parts of it, what Proof he can make of it ?

Mr. *How*. I do not oppose Sir *John Fenwick's* being Examined to this Paper, but it might have been more to your Credit, if you had Examined him before your Vote upon

A Vote made a little before by which that Paper was condemned.

it. But here are a great many Gentlemen rise, to question a Man to that which he does not pretend to any Proof of, nor is any way to the Purpose. It may be possible Sir *John Fenwick* may never have seen any one of the Persons named in the paper and yet all in his Paper be true. The best way for saving your Time is, I conceive, to have the several Parts of the Paper that do concern these Gentlemen read to him, and to ask him upon what Grounds he gave the King each particular Information. This will lead him into all that he knows of the Matter, which is pretended so much to be desired.

Mr. *Boscawen*. I am not against the Question that is proposed last ; but you may ask him that at last. But there is a noble Lord that is reflected on in that Paper, and that is my Lord *Godolphin*, I desire you would please to ask the same Questions as to him.

Lord *Coningsby*. I did intend to take Care of my Lord *Godolphin*, There is a hard Reflection upon that noble Person. But, under Favour, you must, I think, let Sir *John Fenwick* know you have such a Paper, and then ask him in General, What Proof

he has to the Particulars of that Paper ? And then you will do Injustice to no Body.

Mr. Norris. There have been several Questions moved by several worthy Members ; and, I think, the Questions ought to be asked : But, I think, there is one previous Question to all these ; and that is, when you tell him that you have such a Paper, I think the first Question should be, Whether ever he delivered those Papers to the King.

Sir R. Delaval. I find I am named in that Paper that *Sir John Fenwick* hath given ; I desire that part that relates to me may be read to him ; and that he may give a Reason, why he hath said so of me, and *Mr. Killigrew*.

Lord Walden. There is another mentioned, and that is *Commissary Crawford* ; I desire he may be asked, What Proof he hath that he gave Mr. ——— a List of the Army ?

Mr. Chanc. of Exchequer. I can't blame Gentlemen for asking Questions that concerns them, or their Friends : Some are for Reading of it to him, I am against that : But yet I would have you to enquire into this Paper. And being you intend to do it, it might have been as well enquired into before *Mr. Dighton* came last to him. I think you may put your self into an easy Method, and avoid all leading Questions, by asking him upon every Name in that Paper as you come to it, What he knows of that Gentleman ? And ask him no other Question.

Mr. Smith. I was standing up to the same purpose ; I would not have you to put Words into his Mouth, nor let him know by any Question what Answer he is to make.

Mr. Speaker.

Mr. Speaker. Gentlemen, I am willing to do you any Service I can, but here are long Informations, and I never read them, nor know the Contents of them, but as they were read at the Table.

Mr. Att. Gen. I think the Method lately proposed will save you a great deal of Time, and is proper for the Discovery of the Truth; That you will Name the Persons to him in Order as they are in the Paper, and ask him in General, What he knows of those Persons? But when you call him in, I am not for asking him to the particular Things he hath said against them in that Paper; because that Paper, though it is under his own Hand, is not his own; and if he knew it then, he knows it still.

Col. Mordant. I won't pretend to propose any Thing, only for the shortning of your Time: If after you have informed him there is such a Paper, that you should ask him, Whether he would own it? And then, What sort of Proof he will bring to prove it? You will find he will either tell you, he will Advise with Counsel, or whether he will give any Answer at all.

Lord Cutts. I have only one Question to be asked Sir *John Fenwick*; 'tis not a Question that relates to any Person named in that Paper. I think there is no one Person that he hath named but is eminently known or believed to be in the Interest of this Government; and none but what are in some Post of Trust, and Employment in it. Then, I think it highly necessary to know, How it comes to pass that he hath had so much Conversation with Persons of that Character, and none with those People that he hath been seen daily to Converse with? And if

he hath, Why he hath not discovered them, as he hath done the rest ?

Mr. Speaker. Is it your pleasure I inform him that we have the Informations ?

Mr. Palmes. If I am not mistaken, when you first called Sir *John Fenwick* before you, he referred himself to what he had informed the King ; and referred himself to that Paper , as often as you asked him any Questions. And if you ask him general Questions, I presume he will give you the same Answer : Therefore I think, it may be proper to ask him, Whether this is the Paper that he delivered in, or not ? Or otherwise, I doubt, he will tell you , He knows nothing but what is in that Paper. Now, if he refers to that Paper, you may ask him, If he knows it again, if it be shewed to him ?

Mr. Sloane. What this Gentleman hath said, has partly interrupted what I was going to offer. But as to what he says , That when he was here before , he referred to his Confession delivered in to the King ; we did not tell him we knew of that : But he put it further , That he was not bound to Accuse himself, and that what he said might be given in Evidence against him ; and so far he was in the Right. For if he knew of any Body that was concerned in a Conspiracy against the Government , that was Misprision of Treason at least in him. I don't question but it was a very mischievous Contrivance ; but if he should confess it, without some Assurance of being indemnified, he proves himself to be Guilty of it.

Mr. Vice Chamberlain. You are now upon the Method of your Proceedings : There is great Suspicion whether this Paper be Sir *John Fenwick's* own

own or no. If you will tell Sir *John Fenwick*, That in the Paper in your Hand he hath laid Things to the Charge of Persons of Trust, whom this House hath a good Opinion of, and that this House desires to know, What Ground he hath for it? If he does not think fit to give you an Account of it, there is an End of your Enquiry.

Mr. *James Mountague*. The House seems to Agree, that they will have Sir *John Fenwick* sent for in: I suppose you will not have his Counsel, nor Solicitor by; and when he withdraws, I desire he may be kept private from his Counsel and Solicitor.

Lord *Cutts*. By Sir *John Fenwick's* Behaviour, when he first appeared at the Bar, and by what he said then, I believe Sir *John Fenwick* did tell you to this Sense, That he had Assurance from a Noble Person, That what he then said should not rise against him in Judgment; and I think he was told, If he dealt ingenuously, he might expect Favour, or to that Effect. I do for the saving of your Time, mention it to you, to consider how far the House may give him Security, that what he here says shall not rise up in Judgment against him, and that if he dealt Ingenuously, he may expect some Favour from this House.

Mr. *Harley*. You are upon the nicest Thing in its Nature that possibly can come before you. I think before you call him in, it ought to be understood that the Questions be very plain.

Mr. *Manley*. I think you have been well moved from the other side, That we should not read this Paper to Sir *John Fenwick*: And I am

of that Opinion from this Consideration, besides what hath been mentioned. We are here in a Judicial Capacity as well as a Legislative; and this Paper I take to be an Examination made upon Sir *John Fenwick*; and as my Memory serves me, some Things he speaks of as Matters of Fact, which he does positively assert; which being contained in the same Paper with other Matters of Hearsay, if you should Read that Paper to him, and ask him a Question, Whether that be his Paper? That I doubt will be contrary to the Rules of Law: For it will be asking, Whether this Information against himself be true or false? And I think it does not become the Dignity and Honour of this great Assembly, to ask him any Questions that may make him Accuse himself.

Mr. Vernon. I would observe to you, that *Gent.* has not considered these two Papers: The first of these Papers I think the Bill refers to, and that is under Sir *John Fenwick's* Hand and there he does Charge nothing at all upon himself, but it is an Accusation upon the Persons named. In the first Paper he does say, There was a select Number to manage the Affairs of *King James*, but they are not named. Afterwards he went about to explain it in the second; but the Bill referring only to the first, I suppose you will confine your selves only to the first Paper.

Mr. Chanc. of Exchequer. I would Think of some way to reconcile these Things you are going upon: For though Gentlemen are in the right to press for these Questions; yet I do not think it the Business before you. Therefore I think you should acquaint Sir *John Fenwick* that this

this Paper hath been presented to you', which this House hath thought False and Scandalous : But before he goes away, this House has a mind to hear what he would say to it ; and let him say what he will upon that, then you will not lead him by any Question. The first Person that is named I have a great Respect for , and am as willing he should be vindicated as any. The first Question you are to ask him is, What he knows of my Lord Godolphin ? But that you should literally ask him Questions, as the Paper states it , I don't think it proper for this Assembly : For there are Facts beyond the Act of Indemnity many of them. After you have done with the Paper, I have some Questions to ask him. I take these Matters to be false ; but I shall have some Questions to ask him to what I believe will prove true.

Mr. Bridges. Before you call in Sir John Fenwick, I would offer one Thing to your Consideration ; I think that Paper you are upon is written with Sir John Fenwick's own Hand. Why may it not be fit for you to ask Sir John Fenwick if that be his Hand ?

Members. No, no.

Mr. Speaker. Is it your Pleasure that Sir John Fenwick be called in ?

Which Question being put, it passed in the Affirmative. And he was brought in without his Counsel.

Mr. Speaker. Sir John Fenwick, this House does understand that you have given in Informations against several Persons of great Quality , that have been in the Government, and they do expect

pect from you, that you should deal Clearly and Candidly with them, and give them an Account of what you know in relation to those Persons. I am commanded in the first Place to ask you, What you know of my Lord *Godolphin* in relation to this Matter?

Sir John Fenwick. I am under a double Prosecution, Sir, for my Life. I know not but what I say may turn to my own Prejudice. I hope the House will not think it Obstinacy in me; and since this House have done me the Favour to hear me by my Counsel, I hope they will please to consider what they have said.

Mr. Speaker. No doubt the House will consider what you have said by your Counsel, that is, in reference to your own Defence; but they do expect from you as I told you before, That you do deal Candidly with them in what you know of this Matter.

Sir John Fenwick. Sir, I am under Prosecution for my Life; and, I hope, the House will please to consider, That I know not what Inconvenience may come upon me by it; and, I hope, the House will Excuse me, for I do it not out of Obstinacy, but for my own Preservation.

Mr. Speaker. You would do well to Advise your self well in this Matter, 'tis of great Concernment; the Favour of this House, if you deserve it, may be of great Kindness to you. I have only in command to tell you, what the House expect, and you are to consider how to Answer it.

Sir

Sir John Fenwick. I hope the House will not put me upon any Thing that may hurt my self. I should be sorry to incur the Displeasure of this House, but I hope they will consider my Condition ; and I am sure the Justice and Honour of the House is such, That they will not press any Man to do any Thing that may hurt himself.

Mr. Speaker. Sir, if you please to withdraw.

Accordingly Sir John Fenwick withdrew.

Lord Cutts. I would humbly propose something to you to save your Time , and remove this Inconvenience. The House have heard what *Sir John Fenwick* says. I can't but say, that in Matters of Blood we can't be too tender ; but that I would propose to you if the House approve of it, is this ; Suppose you wave this Matter to the last Moment of passing your Bill, and then I shall have something more to say to you in it.

Mr. Clarke. Now I think it very proper for you to proceed in your Legislative Capacity. I am glad the House have taken so much Pains in the Examination of the Matter ; and it is no small Satisfaction to me, That the Gentleman was brought to the Bar upon this Enquiry. Very probable another Time may induce him more to Comply than he does at present, though, if I may speak my Opinion, there is little hope of the Gentleman's Answering your Expectation here : And I think the first thing you are to do now, is to read your Bill.

Mr. Pultney. One of the Allegations of the Bill is, That his Tryal was put off upon several repeated

repeated Pretences of making a Confession. The Counsel for the Prisoner took Notice, That that Allegation was not proved: The Counsel for the Bill told you, They must refer to a worthy Member of this House, who could prove it; the worthy Member is Mr. *Vernon*. I suppose before you enter into a Debate (as there will be after the second Reading of the Bill) Gentlemen will desire to have all the Evidence. And I find your Order is, That Mr. *Vernon* do give in his Evidence while Sir *John Fenwick* is at the Bar; and therefore I humbly move, That Sir *John Fenwick* may be called in while Mr. *Vernon* gives his Evidence.

Mr. *Speaker*. I suppose, if Mr. *Vernon* gives Evidence, you will call in the Counsel.

Members. Yes, yes.

Mr. *Speaker*. Pray then hear the Motion that hath been made. Shall I put the Question, That Sir *John Fenwick* and the Counsel be called in, while Mr. *Vernon* does give his Evidence?

Which Question passed in the Affirmative, and Sir John Fenwick, and the Counsel on both Sides, were brought in.

Mr. *Speaker*. Gentlemen, you that are of Counsel of both Sides, the House, before they proceed any further, was willing to hear the Testimony of a worthy Member of this House which has not yet been given; and they are willing that Sir *John Fenwick*, and you, should be present while it is given. Mr. *Vernon*, will you please to acquaint the House, &c.

Mr. *Vernon*.

Mr. *Vernon*. If I understood the Counsel for the Bill aright, that which they did Appeal to me for, was about the Protracting of Sir *John Fenwick's* Tryal, and upon what pretence it was. The Account, Sir, that I can give of it, is this. That Sir *John Fenwick's* Tryal was put off, will appear best from the frequent Adjournments of the Sessions at the *Old Bailey* for six or seven Weeks together. For when Sir *John Fenwick* was Committed to the *Tower* (which was as I take it) on the 19th of *June*, there was, I believe, a Sessions to be held soon after; for as I remember it, the first Application that my Lady *Mary Fenwick* made for putting off Sir *John Fenwick's* Tryal, was upon the 30th. of *June*, and the Petition was, That he might have some Friends come to him to advise him how to make his Application to the King: On the 30th of *June*, or about that time, my Lady *Mary Fenwick* did first Propose, That some body should be sent over from Sir *John Fenwick* to the King upon some Matters of Importance, but did not declare what they were, but only that she was told there were such Matters, and she had a proper Person to send, and would acquaint the Lords Justices with the Man, if he might have Leave to go: But afterwards my Lady *Mary Fenwick* said she could not provide a Person so soon. And, I think, the 2d of *July*, she came and offered to go her self, and said, if it was not as much for the King's Service, as Sir *John Fenwick's* Benefit, she would not undertake the Journey. She had Leave to go, and would have Capitulated, That the Tryal should be put off till she returned; but the Lords said, when she would return, would depend upon her pleasure; but they would write to the King at the same time, and give notice of her Intention, and that the Tryal should not

go on till they had an Answer to their own Letter.

There was a Passage ordered her in the Royal Transport Ship then going to *Holland*, and my Lady *Mary Fenwick* desired to speak with Sir *John* in Private, in Order to her Journey. The same Night she came back again, and said, she had considered of it, and would not go, and several Reasons she gave for it. Upon the 7th. of *July* there was a Noble Lord that was in the Commission for the Administration of the Government, said, he had an Application made to him from another Noble Peer, my Lord *Carlisle*, who desired that he would go to Sir *John Fenwick*, for he had been very earnest to speak with him. That Noble Lord did acquaint the rest of the Lords Justices with it, who acquiesced in what he thought fit to do in the Matter.

He went the same Day to Sir *John Fenwick*, and the next Day the Lords Justices meeting again, he told them he had been with Sir *John Fenwick*, and what Sir *John Fenwick* had told him, he had sent to the King, for he did not allow it should be otherwise Communicated. My Lords then thought it was very fit to stay for the King's Answer. This was the 7th. of *July*, and by what Accident, I know not, no manner of Account came till the 7th of *August*, that the Letter was received, but the 7th of *August*, the Letter was acknowledged to be received, and the Answer that then came to it, was That the King had not received any great Satisfaction by the Message (I know not what it was) but that Sir *John Fenwick* should be Tried; but withal, that Noble Lord acquainted my Lords Justices, That the King was pleased to

to Write to him, That what Sir *John Fenwick* had to say, should be sent to him in Writing. It happened at that time, that the Judges were upon their Circuits, and there being the King's Directions to receive what Sir *John Fenwick* had to say, in Writing, That Noble Lord did undertake to go again to Sir *John Fenwick*; and, I suppose, he did receive something from Sir *John Fenwick*, which he sent to the King. When the Answer to that came, it was *September*, and that Noble Lord was at the *Bath*; and so it required a little time to hear from him. Then it appeared, That the King's Direction was, That what Sir *John Fenwick* had sent to the King, he should prove it, and he should likewise shew his Ingenuity in Confessing what he knew of any other Designs against the Government. On the 10th. of *September*, as I take it, I was directed to go to Sir *John Fenwick*, who was then in the *Tower*, and to acquaint him with this Message from the Lords Justices. Sir *John Fenwick's* Answer was, That he had no more to say, or Words to that effect, and he must prepare for his Defence as well as he could; but if he could speak with that Noble Lord, he should be glad to do it, but he was not come from the *Bath*, and Direction was then giving for his Tryal again. In the mean time, that Noble Lord came to Town, and he went to Sir *John Fenwick*, and brought an Account from him, That Sir *John Fenwick* would prove to the King, and make out what he had said; and was ready to give the Lords Justices Satisfaction. Upon that, I was sent to Sir *John Fenwick*, and I carry'd the Message in Writing, which you may see when you please; and it was to ask him, Whether he was willing to make out by Proof, what

what he had already said to the King, and whether he was ready in Compliance with the King's Directions, to give the Lords an Account of what he knew of any Design against the Government? I carry'd Sir *John Fenwick* this Message, and he returned an Answer in Writing, That he was ready to make out to the King, what he said, and would acquaint the Lords with all the Matter that he had not observed to the King. His Arraignment was then to have come on the 17th. but he did Dictate a Paper which was brought to the Lords, which they thought fit to be sent to the King, and the Tryal was put off as to that time, And before an Answer from the King came, it was (I believe) the beginning of *October*: And this is the Account I have to give you.

Mr. Speaker. Gentlemen, you Consider that this Evidence is given, with Relation to that part of the Bill, that sets forth, how Sir *John Fenwick* had delay'd his Tryal by Offers of Confession. You have heard what the Evidence is; if you have any thing to observe as to that point, you may speak before you withdraw.

Sir Tho. Powys. As to this Matter, I can only say, That in it self at least, according to our Rules of Law, it is not, in any degree, Treason: What you will Construe it to be, I can't tell. We think it is only what is very usual when Persons are under an Accusation; they will put off their Tryal as long as they can: Perhaps their Witnesses may be out of the way, or something else may be the Reason of it, and it does not carry any Crime in it self; or at least, not of the Nature that this Bill is of.

Sir Barth.

Sir Barth. Shower. We do think, with Submission- That considering the Nature of the Bill, and the particular Case of *Sir John Fenwick*, it will (in some measure) answer this Fact : I take this singly in it self, as it hath been observed, not to consist with Honour ; but it does not import a Crime for any Man to use little Insinuations to put off his Tryal : But, suppose it was unlawful, or that which they call Prevaricating. I hope it is far from making him Guilty of High Treason, which is the greatest Crime this Bill designs to pass Sentence for ; and, I hope, you will Consider, if it be an Offence, 'tis so at the Common Law ; and the same Evidence will prevail to bring *Sir John Fenwick* to Condign Punishment by the Common Methods. And if it be no Offence, I hope you will not by a Law make it an Offence, so as to inflict the greatest Punishment for this Artifice.

Mr. Speaker. Mr. Sergeant Gould, Have you any thing to say ?

Mr. Serg. Gould. No, Mr. Speaker.

Mr. Speaker. Then withdraw.

And being withdrawn.

Mr. Sloane. I Propose it to you, Whether, if the Paper be Evidence. it should not be read in the Presence of the Prisoner ?

Members. No, No.

Then the Question was put for Candles, which passed in the Affirmative, and they were brought in.

Ordered, That the Counsel be discharged any further Attendance at this time.

Mr. Methwin. There can be no Debate previous to the Reading of your Bill. I desire the Order of the Day may be Read.

Accordingly, the Order of the Day for Reading of the Bill a Second Time, was Read by the Clerk.

Then the Bill was Read a Second Time by the Clerk.

And being afterwards opened by *Mr. Speaker*, and *Mr. Speaker* having expected for some time, and no Member rising up to speak.

O

Mr. Speaker.

Mr. Speaker. Shall I put you the Question of Commitment ?

Sir Tho. Dyke. Sir, I hope you will not put the Question of Commitment till some Exception is made to the Bill. I am sure it is as liable to Exceptions as any Bill that hath been brought in a great while. 'Tis a tender Subject to speak of, the Pretence of the Bill being for the Preservation of the King and Government ; and if I thought it was really so, I should be heartily for it ; for I think there is no Comparison between the value of the King's Life, and that of a Private Person's, but that hath been often said, but not proved ; therefore, I think, I may tell you my Reasons why I am against the Bill. That the Parliament hath a Power to make such a Law, is agreed ; but I think it ought not to be used but upon Extraordinary Occasions, when Great Persons are concerned, that can't be otherwise brought to Justice, and when Crimes do not fall under the Denomination of the Law, which is not the present Case. This Case is, That a Gentleman is charged with Treason, and 'tis proved but by one Witness, though the Counsel did say, That a Consult to Levy War was not Treason. Now, either it will not be the Crime that is alledged, or it is not proved. Here you are Judges, Prosecutors, Witnesses, and Jury : I would know in what Country it is so besides ? The Witnesses are produced here, and not Sworn ; and upon the whole, there is but one Witness. Sir, I am against the Bill, and against it, as being of dangerous Consequence.

Mr. Pultney. This Matter before you is of such a Nature, that I hope all Gentlemen will hear one another with the greatest Attention that may be.

The Worthy Member admits you have a Power to Pass the Bill, and I do not find that contested by any Body ; though (with Submission) the latter part of what he said, contradicted what he admitted at first ; but since that is so much Agreed, I shall say but little to it, and that is this, That without such a Power

Power as this, any Government would be imperfect, and would want a sufficient Power for its own Preservation, upon Extraordinary Occasions. You have been told, this hath been an untrodden Path ; but I believe, Gentlemen are pretty well satisfied it hath not been so untrodden, and many Precedents of that kind have been quoted ; and the Counsel for the Prisoner have admitted, That there have been frequent Precedents. An Objection hath been made to some of them, That they were made in ill Reigns ; but I take it to be no Objection, That the Precedent was made at one time or another, since 'tis agreed, that we have such a Power, and that that Power hath been exerted.

The chief Matter before you is, Whether in the present Case, there is sufficient ground for you to Exert that Power ? And upon that, give me leave to observe the Nature of the Crime of this Gentleman, and the Evidence that hath been brought to prove him Guilty of that Crime. His Crime is High Treason, the highest Crime in the Law : 'Tis for Conspiring the Destruction of the King, and the Overthrowing of the Government. The Overt-Act, which the Bill tells you (and is mentioned in the Indictment) is his Inviting in a *French* Force, in order to accomplish this Design. If this Crime would admit of Aggravation, some other parts of the Bill would aggravate it ; but I think it will admit of none. The Counsel at the Bar made a doubt, Whether or no, that which was laid in the Indictment, did amount to a sufficient Overt-Act of High Treason ? And his Argument he drew from a Book that hath been put out by a Learned Gentleman of the House ; but the Gentleman could easily have answered himself ; and, I presume, did not speak his own Opinion. For that very Gentleman writ a Book, called, *His Majesty and Government Vindicated* ; by which he endeavoured to overthrow the Arguments in the other Book of the other Gentleman.

As to the Proof before you, you have have had the Testimony of Mr. *Porter*, whose Evidence hath been justified by the several Convictions grounded upon it ; and by the Confession of several Gentlemen, that have owned the Fact at the very time when they were going out of the World : And there hath been no Evidence brought by the Prisoner at the Bar, that could invalidate the Testimony of this Gentleman. And so (with Submission) you have one undoubted Evidence, that does Charge the Prisoner with the Fact mentioned in the Bill : You have other Proof that does not come up within the Letter of the Law ; but you have strong Circumstantial Proof, that every Gentleman will apply to his Conscience in the Judgment he shall give in this Matter. One of the Allegations in the Bill is, That he did by repeated Promises of making a Confession, from time to time, gain a delay of his Tryal. It is a great Presumption, That that was in order to a Design that he had of Seducing Mr. *Goodman*, who was one of the Witnesses ; for it was observed to you, what Practice there was in the Case, with the other Evidence, Mr. *Porter*.

Sir, Gentlemen have objected the Consequences of making a Precedent : You were very well told by a Worthy Gentleman, that spoke the other Day, near the place where I am, That in the Case of a Good Parliament, 'tis not to be imagined that they will make use of this Precedent, but upon as good a ground as you have now ; and an Ill Parliament, they will have the same Reason, for they will Copy after the same Precedents that have been made before, and will not stick at doing of it.

Besides, let Gentlemen consider this way of Arguing ; I have a Power to do such a thing, and yet if I have such a ground as is sufficient, I shall not make use of it : To say you have a Power, but shall not Exert it, is as good as to say, you have no Power at all.

There

There were some Precedents cited by a Learned Gentleman that spoke against the Bill, and he particularly quoted that of my Lord *Strafford*; and the Act of Parliament that Repeals that Attainder, was in part Read to you: But, Sir, the Reasons given in that Bill of Repeal of my Lord *Strafford's* Attainder, are, That it was obtained in a Tumultuous Manner, which influenced the Parliament in doing of it; and that it Passed in the House of Lords, when most of the Lords were absent: And at last, the King, when he gave his Consent, by Commission, to the Passing of the Bill, it was with great Reluctancy. 'Tis certain, all these are Reasons that are given; but there is not one that questions the Parliament's Power of doing it; though upon the Tryal, Gentlemen may remember, there was a doubt in the Law, Whether the Evidence was sufficient.

Sir, It hath been urged to you, of what ill Consequence it would be, and how much Injustice to make a Law to Punish a Man, *Ex post Facto*: but that the Parliament may Declare that to be a Crime, which was not so before, no body doubts; and without that, the Clause in 25 *Ed. 3.* signifies nothing; and I don't imagine it is a greater Injustice to supply a point of Form, as to Matter of Evidence, when the Fact committed by the Prisoner, was against a known Law, at the time when it was committed: And the rather, if I think that defect of Form in the Courts below, was occasioned by the Prisoner. 'Tis a Matter of Blood, 'tis true, but I do not aim at this Gentleman's Life in it; but any Man must believe he must be concerned in great Matters, to bring to pass this great Design; therefore all I Propose by it, is to get his Confession, which in all probability we might have had, if the other Witness had remained here.

Sir, upon the whole Matter, I do think we have Power to do this: I do think here is good Evidence (I speak with respect to my self) to think him Guilty

of this Crime. I do think, if this Bill does miscarry, there is the greatest blow that can be given to your Constitution. And give me leave to use this Expression, I think, if this Bill miscarry, it not only turns this Plot upon you, but makes it impossible ever to come to the Depth of any other. And for these Reasons, I am for Committing of this Bill.

Mr. *Newport*. Sir, I am unwilling to trouble you at any time, but more especially in this Debate, when I am afraid I am like to speak against the Opinion of the Majority of the House. For I see Gentlemen begin already to be in haste for the Commitment of the Bill; but it was the Saying of a Learned Man, *De morte hominis non est cunctatio longa*, We cannot too well consider where the Life of a Man lies at stake.

Sir, In this Matter I look upon my self (as every Gentleman here is) to be a Judge; and therefore I will in this Case, as in all others, go according to the Dictates of my own Conscience. I must be saved by my own Faith, and never will pin my Faith upon another Man's Sleeve: Perhaps it may be a Weakness in my Nature, that I am very tender in Matters of Blood, Blood once spilt, is never to be gathered up again. And therefore I hope Gentlemen will have so much Patience one with another, as to suffer a Bill of this Consequence to be debated fully, before we come to any Resolution. A Gentleman below said the other day, it was possible, in his own private Opinion, he might believe the Prisoner Guilty; and some notice was taken of those Words. But, Sir I would put a Case for Argument-sake, and would have it taken no otherwise; and I would go a little further than that Honourable Gentleman: And suppose I knew of my own Private Knowledge, that Sir *John Fenwick* was Guilty; yet, Sir, with Submission, as a Judge, I do not think it ought to weigh one way or another with me, and I will give you my Reason for it. For, as a Judge, I am to go according to my Judicial Knowledge, and not according to my Private

vate Knowledge. 'Tis a Maxim in Law, *Nil refert quid notum sit Judici, si non notum sit in forma Judicii*. And it puts me in mind of a Case in the Book H. 4. where a Man killed another, in the Presence of a Judge, Travelling on the way, when the Murder was. And at the next Assizes in that very County before the same Judge, another Man was Indicted of that very Murder, and Arraigned and Convicted by Verdict. In that Case (says the Book) the Judge ought not to carry himself according to his Private Knowledge which he had of the Fact, and so to acquit the Prisoner; But all that he in that Case could do, was to respite Judgment against the Party, because of the Judge's knowing to the contrary, and to make further Relation thereof to the King for his Pardon of Grace for the Party.

The Evidence that is produced, is a Living Witness: The next Evidence was the Confession of *Goodman*, taken before a Justice of Peace. Now as to that, truly I did not think yesterday it was a Legal Evidence, I am sure in a Court of Law it would not be admitted, but the House was pleased to read it; and Gentlemen when they press'd to read it, told us, *Valeat quantum valere potest*, not as a Conclusive Evidence. Why then, if you strike this Paper out of the Case, with Submission, there is nothing left but the Testimony of Capt. *Porter*, and then in this Case you have but one Witness.

Sir, Give me leave to say, it will seem a little Strange, That the Commons of *England*, that lately were so very careful of the Lives of the Subjects, and were so desirous of Passing a Bill that did provide, That where there were two Species of Treason in one Indictment, and one Witness to one Species, and another Witness to another Species, that that should not be good Evidence to Convict a Person of High Treason: That now we should be for Attainting a Man for High Treason upon one single Evidence: Surely they will say, we have mightily changed our

Opinions since last Sessions of Parliament. I speak not this upon the Account of Sir *John Fenwick*, I know him not, he is a stranger to me, though I am not to his Character, and that I hear is none of the best. I speak it as it may be my Case, or any Man's Case here: God knows we live in unsettled Times, and no Man can tell how soon a Precedent of this Nature may turn upon any Man whatsoever. Some of us may live to see a bad Reign, and then when a Man cannot be Attainted by the settled Rules of *Westminster-Hall*, the Legislative Power must be called in for Assistance, and then I am sure no Man is safe.

Amongst the many Irregularities committed in the late Reigns, I thought that of Mr. *Algernon Sidney* one of the greatest Strains I saw in *Westminster-Hall*; for there my Lord *Howard* was one Witness against him, and the second Evidence was a Book he had wrote many Years before against Sir *Robert Filmer*, (which I think is printed since this Revolution, and I have it in my Study, and I hope I shall not be hanged for it.) I say, this Book, though wrote so many Years before, was construed to be calculated for a Treason that had not been committed above two Months, and was the second Witness to Convict him. But that Attainder was reversed, and it was fit it should be so; for I thought it a hard strain to Convict a Man upon that Evidence.

Sir, I am very sorry this Bill is brought into the House: Nor can I imagine, after all that hath been said by the Learned Gentleman my Neighbour here, why this Man was not tryed when there was two positive Witnesses against him. All the Reason this Gentleman has told you, is, that he promised to make an ingenuous Confession. But any Man might have seen through this Confession, that it was only an Artifice to abuse the King's best Friends; nay, the rather, when this Gentleman's Brother-in-law had served this very Government but two or three Years ago the same trick. We know my Lord *Preston* was attainted

of High Treason, and then he must do something for to merit his Pardon; and he made an ingenuous Confession, as he call'd it, wherein he accused most of the Great Men; and when he had a Pardon, though his Confession was under his own Hand, and delivered to the King, he denyed every word of it, and what he had told, was only, he said, to save his own Life. My Neighbour here cited you several Precedents, I have read many of them, they are most of them mentioned in *Rushworth's* Collections, in the several Arguments that are there for the Passing the Bill of Attainder against my Lord *Strafford*: And all that I can say to them, is, I could not have come up to them, had I lived in those Times. The Case of Sir *John Mortimer*, who being committed to Prison upon suspicion of Treason, brake Prison, and made his Escape; and for this, and no other cause, in the Parliament in the second Year of *H. 6.* he was Attainted of High Treason by Bill in Parliament. So in 3 of *R. 2.* the Case of one *Kirby*, who, without any Malice, and, as the Record says, *se defendendo*, killed the Embassador from *Genoa*; the Parliament declared it Treason. And the last Case he cited was the Case of a Cook, that put Poison into a Pot of Pottage, in the Kitchen of the Bishop of *Rocheſter*, whereof two Persons died. And what did they do? Why, he was attainted of Treason, and it was Enacted, that he should be boyled to Death, by the Statute 22 *H. 8. cap. 9.* I have a great Honour for the present Bishop, but if it had happened in his Family, I should have hardly consented to the like Judgment, *Judicandum est Legibus non exemplis.* There's no Man doubts your Power, but the Question is, Whether you will exert this Power upon all occasions. And in most of the Bills of Attainder that I can find, when Men have come to consider upon second Thoughts, most of those Attainders have been Reversed, and a mark of Ignominy and Reproach set upon them. *Roger Mortimer* was Attainted in the first

first Year of *Edw. 3.* but we find in the 28 *Edw. 3.* that Attainder was Reversed. And why ? Because he was not brought to Answer, as he ought to have been. So likewise the Attainder of the Earl of *Arun-del*, in the 28 *Edw. 3.* Not to mention one of a later date, that of the Earl of *Strafford*, and many more might be cited, but I am loth to tire you ; I should be glad this Gentleman might suffer his due Punishment, but I am not by any means satisfied in the passing of this Bill. And as to his not being Tried, if the Government have slipt their Opportunity, or made any Mistake, I'll not sodder up their Neglect or Defect, or whatsoever you will please to call it, by passing this Bill of Attainder. Sir, I ask your Pardon for troubling of you so long ; but as a Judge, I thought my self in Duty bound to give my Reasons why I must give my Negative to the Bill. I hope no man doubts but I am as Zealous for this Government as any man whatsoever, but let Gentlemen think what they please, I can't give my Vote to the passing of the Bill.

Mr. Sol. Gen. This is a Bill for attainting Sir *John Fenwick* of High Treason ; it is the greatest Crime we know in the Law. and I think the greatest Crime known in any Government ; it is much greater than Murther, or any other Crime, because it subverts the Government, and the Law whereby those Crimes are punished, and whereby ill Persons should be deterred from committing those Crimes, and Innocents should be protected.

It hath been a Question by the Counsel at the Bar, (I think both of them,) Whether this Matter of which Sir *John Fenwick* is indicted and accused, is High Treason, or not ? I must confess, I heard something of it without doors, and that these Gentlemen would undertake to make it out, that though their Client should be prov'd guilty of the Matters charged upon him, yet that it was not High Treason ; I thought it somewhat a bold Undertaking, but I did
not

not think they would have undertaken it, as to the Matter of the Crime ; I thought they would have pretended that there had been some Flaw in the Indictment, That the same as laid in the Indictment, or in the Bill in this House, was not High Treason, but not to have questioned the Nature of the Crime, as now they do.

To maintain their Assertion, they say, That admitting their Client to be guilty of what he is accused of, it amounts to no more than a Design to levy War against the King, and designing to levy War against the King is not High Treason, and for which they quote the Opinion of a Person within these Walls, and one of the King's Counsel, by which description I believe they mean my self ; and I thank them for the Honour they do me, when they quote, as they do, my Lord Chief Justice *Hales* to be of the same Opinion ; both which is true, and I think they said something of my Lord *Dyer*, to the same purpose, and I will give them another good Authority to the same purpose into the Bargain, which is my Lord *Cook*, who says expressly in his Comment on the Statute of *Edw. 3.* That designing to levy War is not High Treason ; and so is my Lord Chief Justice *Hales's* Opinion to be understood, who repeats the Words of the Statute about levying War, and says, (and quotes my Lord *Coke* for it,) that only actual levying War, and not designing to levy War, is High Treason, which must be understood of Treason within that Statute, and not of Treason at Common Law. And as for the Person within these Walls they speak of, he was so very sensible of this Distinction, that his words confine the designing to levy War to be not Treason within the meaning of the Statute of *Ed. 3.* but doth not deny it to be Treason at the Common Law : If therefore this Tryal had been before the Justices of the *King's Bench*, *Oyer and Terminer*, or Goal Delivery, these Gentlemen had said very materially for their Client, that Statute confining those Courts

Courts to the Connufance of the Treafons declared by that Statute, and taking from them the Connufance of any other Treafons at the Common Law. But this being a Tryal in Parliament, which that Act declares in future Times would take Connufance of other Treafons than what in that Act are exprefs'd, and Parliaments in fucceeding Times having always adjudged other Treafons than what in that Act declared.

Admitting what the Counfel fay to be true, That designing to levy War is not Treafon by that Statute, it is not at all to the purpofe, in reference to the Matter in queftion ; but I own this is a Matter I juft now thought on ; for tho' this is not a good Answer to the Objection when made in this Profecution, and in this Place, yet it is an Answer to the Objection, if it had been made on the Profecution in another Place where this Matter was before it came here, *viz.* before Commiffioners of Gaol Delivery, but I muft own I do not believe it was then confidered whether a Design to levy War againft the King was Treafon, or not, nor was there any Occafion for it. The Crime of the Prifoner at the Bar being a Treafon of another Nature, (that is to fay) Treafon in designing to depofe the King, which was always held to be High Treafon within the Words of the Statute, *Compafling and imagining the Death of the King*, (that is to fay,) designing his Death in his politick Capacity, and it is not material by what Method that Design is to be brought about ; it is not lefs Crime to do it by the Method of levying War, than by any other way, but rather a greater ; and I challenge any Perfon to fhew me the Opinion of any Lawyer that fo much as doubted whether designing to depofe the King was High Treafon ; and my Lord *Coke*, and my Lord *Hales*, in the fame Pages that they fay, That designing to levy War is not Treafon within the Words or Meaning of that Statute, exprefsly fay, That designing to depofe the King is High Treafon within the Words of that Statute,

tute, viz. *Compassing and Imagining his Death* : And I will likewise challenge any Man to shew me, if he can, that admitting the Evidence given against the Prisoner is true, that the Prisoner was not designing to depose the King, and for this purpose take the State of this Case, and that of my Lord *Russel*, which hath been mentioned by the Council ; in that Case, the great Matter was, That the said *Russel* and others sent some Persons to view the Guards, (it was said in order to seize the King, but that was not proved.) This was pretended to be Evidence against my Lord *Russel*, of a Conspiracy to levy War against the King, tho' in another Case, it was said by the Court, That it was not so much a Conspiracy to levy War against the King as against the Guards, but there was no Evidence either precedent or subsequent to the Message to what purpose that was designed. The Case in question is of a quite different nature : Captain *Porter* hath given you an account of it, (and I think *Goodman's* Examination is to the same purpose,) That the Conspirators met at the *King's Head Tavern* in *Leaden-ball-street*, and consulted how to bring back King *James* again ; and the only method they could think of, was to send *Charnock* into *France*, to King *James*, to desire him to prevail with the *French King* to send them 10000 Men, and that they would meet those Forces here with 3000 Horse. And for what purpose was this ? It was to bring back King *James* again. I would be glad to hear if those Gentlemen that were at the Bar, or any body else, could say this was any thing but a Design to depose King *William* ; and because it may seem a little hard to punish a Man capitally for the bare designing to depose the King, where the Effect did not follow, pray give me leave to speak a Word or two to that matter.

Treason against the Government is of a different Nature from all other Crimes : Designing to murder a Man, (though a Father,) or to rob, is a Misdemeanour,

meanour, and no more : and as such, is punishable to deter others from designing the like ; but the Mischief of that Design, neither to the Government, nor the Person designed on, is not very great ; for when the Matter is disappointed, the Person designed on is at the worst but frightened, and sometimes he is in perfect Safety before he knew he was ever in danger. But it is not so in Treason, a Design of that nature shocks a Government, and exceeds the Damage done by the committing those other Crimes ; as take this for Example. Did not the Agreement of some Persons here, (I do not yet say Sir *John Fenwick* was one of them,) to raise some Horse here, and with them join the *French* on their landing ? Did not that, I say, encourage the *French* to come ? And did not that Design of the *French* put this Nation in Arms, for their necessary Defence ? And did not the Charge of that come to more than all the Loss the individual Subjects here lost by Robberies for more than Seven Years past ? and yet Persons guilty of those Crimes we can be contented, without any Reluctancy, to see destroyed every Day, though perhaps driven to the Courses they took by Necessity. But these Men we think hardly used, though the Mischiefs they brought on the Nation was not by Necessity. And I would have another thing considered : Was not the Government necessitated to secure in Prison all they suspected, and amongst them several innocent Persons ? And was not the Mischief of that too to be charged to the account of those guilty of the Design you are now enquiring of ? I say, let these things be considered, and it will not be found that those guilty of the Design in question are hardly used. And so much for the matter of Treason as it is charged in the Indictment.

The next thing to be considered, is the ill Consequence of such a Precedent, of the attainting a Man of Treason by Act of Parliament, which the Council

fel at the Bar have said hath been always blamed, and sometimes even by Parliaments themselves.

I must confess, I am not afraid of a Precedent of this kind : I believe if these Gentlemen would but look a little back, they would see the Attainders by Act of Parliament to have been so few, that there would be no reason to be afraid of the Consequence of these Precedents. I dare say, there have been more Men destroyed by the irregular Judgment of one Commission of *Oyer and Terminer* than by all the Acts of Parliaments of this kind since Parliaments have had a Being, and yet we have not thought fit to lay aside those Commissions.

The Truth is, it hath been the irregular Proceedings in obtaining those Acts have been blamed, and not the making use of the Legislative Power for that purpose ; and therefore consider the Acts of Attainder mentioned by the Council, which have been blamed, and first, that of my Lord *Cromwel* which my Lord *Coke* blames : One of the Council at the Bar pretended to repeat my Lord *Coke's* Words of that Matter at large ; but he did not deal so candidly with you in that matter as he ought to have done ; for he should have repeated all my Lord *Coke* says on that Subject, which was, That *Cromwel* was never brought to answer, never permitted to say any thing for himself, either in Parliament or elsewhere, and for that Reason alone my Lord *Coke* blames that Precedent. Now, pray Sir, is this the present Case ? Hath not Sir *John Fenwick* been heard by you ? I would be glad if these Gentlemen, or any body else, could shew that any Person hath had so fair an Hearing before Commissioners of *Oyer and Terminer*, as Sir *John Fenwick* hath had before you.

As to Sir *John Mortimer's* Case, which was in the Second Year of *Hen. 6.* it is much of the same nature : My Lord *Coke* says, There was a Jealousie that the *Mortimer's* Title to the Crown was better than that of the House of *Lancaster*, and therefore to put

put a Slurr (a Blemish I think my Lord *Coke* calls it) upon that Title, it was pretended, That Sir *John Mortimer* should give out, That the Earl of *March* should be King by Right, and that himself was Rightful Heir to the Crown after the Earl : And if the Earl did not Challenge the Crown, he would pretend to it himself ; and that he would for that purpose go into *Wales*, and raise an Army of Ten Thousand Men. Of which words Sir *John Mortimer* was Indicted, but that Indictment being meerly feigned and insufficient in Law, they were not able to proceed that way, and therefore they made it good by an Act of Parliament, and Sir *John* was brought into the Parliament, and without Arraignment or Answer, was condemned. So that my Lord *Coke's* Complaint is this, That those Persons so condemned, were never heard. And if this be the truth of the Matter, these Precedents, with Submission, have no affinity to yours ; but I believe it may be said in this Case, that Sir *John Fenwick* hath been heard, and that more than ever any one in Parliament was before in any Capital Matter.

And as to the Case of my Lord *Strafford*, he had Counsel assigned him, to stand by and hear, but not to prompt him. If there arose any Point of Law, he was himself to propose the Matter to the Lords, and the Counsel was to assist him only when the Lords so directed them. But in the Case here before you, you have allowed Sir *John Fenwick* Counsel, not only to assist him in point of Law, but to assist him in point of Fact too ; and they have made Answers for him as to Law and Fact. So that I say, he hath been tryed fairer than any Man ever was in Parliament, be it upon Bill, or upon Impeachment.

And further, as to the said Earl of *Strafford's* Case, the Act which Reverses his Act of Attainder, recites and blames the Methods whereby that Act of Attainder was obtained. As that an armed Multitude came down to *Westminster*, and filled both the *Palace-Yards*, and all the Approaches to both Houses of Parliament,
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and with Fury required Justice against the said Earl, and posted up the Names of such as were for the said Earl, and called them *Straffordians*, and Enemies to their Country. And by such ways that Act passed, nothing of which can be pretended in this Case.

It was objected, That though a Judge do think in his Conscience a Person Guilty, or not Guilty, yet he ought not to make use of that private Knowledge. And a Case was quoted out of *H. 4.* for that purpose, That a Man was convicted before a Judge, and condemned by him for a Crime, of which the Judge knew him innocent. And from thence inferred, that we, as Judges, could not do *Sir John Fenwick* Right, since, as Judges, we could not make use of our private Knowledge. But I think the Authority of that Judge ought not to weigh with us, for I think that Judge might have behaved himself better than he did, and sure I am, now he would have been blamed. I do not say, that a Judge, in his own private Opinion, ought to Judge, he ought not; but if a Judge upon the Bench knows any thing whereby the Prisoner might be acquitted, or convicted (not generally known) then, I say, he ought to go from the Bench to the Bar, and give Evidence of his Knowledge to the Jury, if there were enough in Commission upon the Bench to maintain the Presence of the Court, as there generally is. And so the Judge in *Henry* the Fourth's time ought to have done, and not to have suffered the Person to be convicted, and then get a Pardon for him: For a Pardon will not always do the business; for there may be a Forfeiture, that the King's Pardon doth not restore. But though we act as Judges here, we don't act only as Judges, I thought we were as well Tryers. or a Jury to pass on this Fact, as well as Judges: And it is the Duty of every Jury-man to give a Verdict on the Matter tryed, according to his own knowledge of the same, if he have any knowledge of the same. There is difference between the Judicature of *Westminster-Hall* and this

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Court : They are to Judge upon a Fact found by a Jury, but we act both the Part of a Jury in Trying, and also of Judges, in Judging what Crime the Fact amounts to. So that if a Jury-man may make use of his Private Knowledge to acquit a Prisoner, as I think no body doubts but it is his Duty to do, then every Gentleman in this House may make use of his Private Knowledge to Acquit the Prisoner, or Convict him. And so much for the Method of proceeding by Bill of Attainder.

The last thing to be considered is the Evidence, and in that Matter these two things are to be chiefly considered ; Whether what *Goodman* swore against Sir *John Fenwick* (*Goodman* not being now here) is Evidence against Sir *John Fenwick*. And if it be not, whether Sir *John Fenwick* may be justly Attainted by this Bill, upon the Evidence of one single Witness only ?

It is agreed of all Hands, That at the Common-Law, in all Capital Crimes, as well Treason as any other, this of *Goodman's* had been good Evidence ; and likewise that a Man might have been convicted upon the Evidence of one single Witness. It is agreed on all hands, that in all other Capital Crimes (but Treason) at this day, this of *Goodman's* is good Evidence ; and one single Witness, if credited by Twelve Jury-men, is sufficient ; and an Hundred Witnesses, if not so credited, is not sufficient to Convict a Person of a Capital Crime. And it is agreed of all hands, That since the Statutes quoted of *Ed. 6.* this Evidence of *Goodman's*, nor one single Witness, is not sufficient to Convict a Man for Treason in the Court of *King's-Bench*, nor in any other inferiour Court of Justice. The single Question therefore is, Whether those Statutes, or the late Act for Tryal of *Treasons*, ever were designed to bind, or do any ways bind or influence the Proceedings in Parliament for Treason by Bill of Attainder, or whether those Rules the Parliament gives the Courts below to proceed by,

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ought in Justice to be the Rules you ought to proceed by in this or the like matters.

I believe that no Person that reads the Statutes, can pretend to think that they had any respect to Proceedings in Parliament. For to give but one Reason for a great many: Those three Statutes that require two Witnesses to Convict a Person of Treason, except in one Case, which is, where the Person *Arraigned* confesses himself Guilty; in that Case the Statute doth not require two, nor any Witness. Now, every Man knows that the word *Arraigned* is proper for the Court of *King's-Bench*, and other inferiour Courts, and perhaps for the Parliament where Proceeding is by Impeachment, but never when the proceeding is by Bill. Nay, the Party accused was heretofore rarely brought into Parliament when the proceeding was by this way, and not unless he himself desired it. And as for the Earl of *Strafford*, though he was present when he was prosecuted by Impeachment, yet after the Bill of Attainder voted against him, he was never heard in Person, nor by Counsel against it. The Expressions therefore of those Statutes no way suiting this Case, it can never be thought that those Law-makers intended by those Statutes to bind proceedings in Parliament in the like Cases to this, and the rather, because they could not but know, that if they had designed it, they could not have done it, because subsequent Parliaments, or the same Parliament in another Session, might have Repealed their Acts two ways, either by express words, or might Repeal them by Implication, without mentioning the Acts in a particular Case; for if the matter of a subsequent Statute in a particular Case is contrariant to the Matter of a former General Statute, it is an Appeal of the former General Statute, *pro tanto*.

And as for the last Matter, how far it is fit for us to Judge by those Rules we give to Inferiour Courts of Judicature, I believe there is no Person but in the ordinary acts of his Life doth every day determine it;

for he gives those Rules to his Servants to act by, as he doth not always Govern himself by in particular cases, as having a better Opinion of his own Understanding, Integrity, and such-like Qualifications, than he hath of those Persons to whom he prescribes Rules to walk by. And it is plain by the Clause of the Statute of E. 3. before-mentioned, that Parliaments were not intended to be bound by those Rules they prescribed to Inferiour Courts of Justice, when they expressly forbid the Inferiour Courts to Condemn any Person as a Traitor, for any other Crime than what is declared in that Statute ; and yet in the same breath, as it were, declare, That the Parliament shall in future Ages condemn Persons as Traitors for other Crimes than what is in that Statute express. The whole matter therefore, as to this last point, seems to be, Whether we do believe Sir *John Fenwick* Guilty of what he is accused ; and if we do, it is not material whether such our belief is founded upon the Evidence but of one, or of more Witnesses : Or upon the Evidence of a Deposition, or of a Witness, *viva voce*, in Court. To believe, or not to believe is in no man's power ; he may indeed disguise his Thoughts to another, by saying, he doth, when as in truth he doth not believe, & *é contra*, but he cannot deceive himself, and not believe a thing to be true, because he wishes it was not true.

Upon the whole matter therefore, I think if any Gentleman doubts whether Sir *John Fenwick* is Guilty of the Crime of which he is accused, or doubts whether that Crime be High Treason, or whether he be Legally Prosecuted, that Gentleman in Conscience ought to be against this Bill. But if any Gentleman is fully satisfied that Sir *John Fenwick* is Guilty of what he is accused, and that his Crime is High Treason, and that he is Legally Prosecuted, I think that Gentleman, in Duty to his Country, ought to be for this Bill. I think he is Guilty, and that his Crime is High Treason, and he is Legally prosecuted, and therefore I am for Committing the Bill.

Mr. Harcourt.

Mr. Harcourt. I can readily agree with the Gentleman that spoke last, that High Treason is the greatest Crime in the Law ; and further, That the Matter of the Indictment that is mentioned in the recital of the Act, is undoubtedly High Treason ; and I am sure he will agree with me in one thing also, That the greater the Crime is that any Person is accused of, the clearer the Proof ought to be, by which he is convicted.

Some Gentleman have begun their Discourse in Relation to our Power, but sure 'tis no Argument because I can do a thing, therefore I will do it, because we have Power to Repeal *Magna Charta*, and all other subsequent Laws which have been made in Favour of Life, and Liberty, and Property, by the same Consequence we ought to do it : A better Reason must be given me, before I consent to this Bill.

Then for the Precedents, 'tis said, There have been many, and many have been mentioned ; and if I thought it worth while, I could mention many more you have not heard of : As for Precedents in general, they are so far only imitable as they are grounded upon true Reason, and agreeable to Justice ; but I don't remember any one Precedent of this Nature, of a Person in Custody, forthcoming, to be Tryed, yet Attainted without a Tryal at Law, but what has been Universally branded ; and they all seem to be Reproaches even to those Ill Reigns in which they were usually made ; and rather to be marked out as Rocks for us to avoid, than Patterns for our Imitation.

Before I particularly mention the Facts how they stand before you, I would beg leave to observe somewhat upon the general Method of your Proceedings, and tell you what staggers me in it.

I have often heard this called a Tryal, and that we are the Judges. The Gentleman that spake last gave us another Title, and told us we were the Jury also. I know no Tryal for Treason, but what is confirmed by *Magna Charta*, per *Judicium Parium*, by a Jury,

which is every Englishman's Birth-Right, and is always esteemed one of our Darling Priviledges, or *per Legem Terræ*, which includes Impeachments in Parliament; but if it be a Tryal, 'tis a pretty strange one, where the Person that stands upon his Tryal hath a Chance to be hanged, but none to be saved. I can't tell under what Character to consider our selves, whether we are Judges or Jury-Men? I never heard of a Judge, I am sure not of a Jury-Man before, but he was always upon his Oath: I never heard yet of a Judge, but had Power to examin Witnesses upon Oath, to come to a clear Sight and Knowledge of the Fact: I never heard of a Judge, but if a Prisoner came before him, the Prisoner was always told, he stood upon his Deliverance, and he had not only a Power to condemn the Guilty, but to save the Innocent. Have we this Power? Suppose upon such a Tryal as this (if it must be called so) it may so happen, that a Person that comes before us, should be the Innocentest Man in the World; What Judgment is it that we can give, for so much as such a Person hath made his Innocency fully appear? Is the Speaker by his Warrant, to send him back again to *Newgate*; You can't dispose of him otherwise, though you were satisfied of his Innocency: But in such a Case, the Party must undergo a double Tryal, which is contrary to all Rules I have heard of. If I am a Judge in this Case, I beg leave to tell you for my own Justification only, what a Definition I have met with of a Judge's Discretion; My Lord Chief Justice *Coke* says, 'Tis *Discernere per Legem*; and by that Discretion I beg leave to consider this Case, if Judges make the Law their Rule, they can never Err; but if the uncertain arbitrary Dictates of their own Fancies, which my Lord *Coke* calls the crooked Cord of Discretion, be the Rule they go by, endless Errors must be the Effect of such Judgments.

As to this particular Case, I did expect from the Gentleman that spoke last, that he would have told you there

there was a plain Evidence why you should go on to the passing of this Bill ; but instead of that, I am surprized to hear a thing mentioned, that in Parliamentary Proceedings, a Man may be hanged by one Witness, certainly that is not to be taken for granted.

As to this particular Case, I would take Capt. Porter as upon his Oath for Supposition : You have one Witness against Sir John Fenwick of High Treason, and with your leave, desire to Examine what you have more in this Case.

Yesterday you Voted a Paper to be read, *Goodman's* Narrative, or Examination ; 'tis a different Case now. Now you have it before you to Determine upon. Yesterday the Question was only for hearing : Let Gentlemen now consider how far they ought to believe it, and the other Evidence we hear. And first, there is some Evidence that *Clancy* tampered with *Porter*, and gave him a Summ of 300*l.* and so they would infer, because *Porter* was tampered with to be gone, therefore *Goodman* was. It was told us further (and I desire I may be informed if I am mistaken) That *Clancy* said he came from Sir *John Fenwick*, and afterwards my Lady *Mary Fenwick* said she would make good what *Clancy* had said ; and from these Arguments they presume that Sir *John Fenwick* knew of it. Give me leave to tell you a Rule I never heard contradicted, That Presumption is to be made in favour of Life, but to presume a Man Guilty because *Porter* was tampered with by another, because he said it was by Sir *John Fenwick's* Order ; shall we presume Sir *John Fenwick* did it ? Is Hearsay to be Evidence, or is a Man to be had to the Gallows upon Presumption ? How often, and with how much Reason have we heard Exclamations against Judgments, upon Presumptions, *Inuendoes*, Constructive, Accumulative Treason ? &c.

Gentlemen, there is some further Evidence ; and that is, of what was Sworn at *Cook's* Tryal, and some Gentlemen thought fit to have the Record read, and

an Examination of what was Sworn there. I can never go so far as to think it Reasonable, That what Evidence hath been given in one Case should affect another Man ; but all this is to be Answered, by calling it Parliamentary Proceedings. No doubt 'tis no Evidence in the Courts below, but they are mentioned with some kind of Disdain, as very inconsiderable. In this Case, I beg leave to say this in their Vindication, That whatever the Rules of *Westminster* Hall are, 'tis not therefore Reason because 'tis a Rule, but because 'tis Reason, and Reason approved of by long Experience, therefore 'tis a Rule, and if they make their Rules for that Cause, I hope this is a Cause why we should imitate them : But I would not have those Rules thought Matters of Form, but Substance, or more properly part of the Law it self.

Upon the whole Matter, if no Gentleman will give us a Reason why this is Evidence, but it must be taken for granted, here is but one Witness, and that not upon Oath ; and if we are to come to our Parliamentary Discretion to supply that Defect, the Want of the other, 'tis a Discretion I will disclaim all the Days of my Life. And I hope you will reject the Bill.

Lord Cutts. If, Sir, the Gentleman that spake last had been speaking in *Westminster* Hall, I should think that he had shewed a great deal of Reason, and spoke with a great deal of Judgment : But since I think you are here, upon a quite different Foot, I shall not follow him (because I will not unnecessarily detain you) to answer every particular.

I remember when the Counsel for the Prison first spake, they took Notice to you, That Precedents were Procreative, and one begat another, and are apt to Multiply ; therefore, I do think, 'tis of the highest moment to you, what Precedent you make to Night : And if any Gentleman can be satisfied, That the Precedent of not passing this Bill will not be of worse Consequence than the Precedent of passing it, I shall humbly submit. I do think, Sir, the Matter before
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you is really of the highest Importance ; and I must confess, 'tis with a great deal of Satisfaction to my self, that I do see Gentlemen seem to apply themselves with a great deal of Seriousness to this Debate. Sir, I shall not pretend to make a particular Answer to what the Counsel for the Prisoner did say, as to the Precedents of Acts of Parliament ; I think this Answer is sufficient at present for that, That if we have no Precedent, we are under a Necessity of making one. It is told us, That of all the Precedents none will Justifie us in this Proceeding ; but at the same Time it must be considered, That we are in a Case, the like to which never yet hapned in *England*,

The first Thing I shall apply my self to, is the Jurisdiction of Parliaments ; and truly, I think, it will be very necessary to say a little upon that. I have heard none call their Power in Question, the Thing speaks it self ; 'tis the Legislative Power, and the Etymology of the Word tells you what it is ; 'Tis a Power that can make Laws, and abolish them ; a Power that is superior to all other Powers whatsoever, and we are part of that Legislative Power, and therefore shall say no more to that, it being a matter agreed, That we have a Power to proceed in this Matter. Now I will take leave to observe something as to the particular Case before you.

Though a Gentleman that spake some time since, did speak to you of the nature of the Crime ; yet, with Submission, I think there remains something to be added to what he said. The Conspiracy of which Sir *John Fenwick* to me appears Guilty, is not only against the Life of the King, not only to depose the King, not only a Conspiracy to raise Rebellion ; but at the same time to contrive an Invasion from *France*, and bring in a Foreign Power. I know not what better Expression to tell my Thoughts in, than by using a Term which Physicians use in some desperate Cases ; they tell you, There is a Complication of Distempers, and I think this is a Complication of Treasons :
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This is the highest Crime, and it is attended with all the aggravating Circumstances this Crime can admit of. Now in giving our Opinion, and passing our Judgment upon this Matter, I think there are two Considerations ought to Guide us; there is a Consideration we owe to the Prisoner that is brought before us, and another Consideration which we owe to the common Security. As to the first of these, it being a Matter of Blood, wherein the Life of an Englishman, the Life of a Gentleman of his Quality and Figure is at Stake, we ought to proceed with all the calmness that is possible; and I do agree, if there was nothing but Presumption, that ought to be in Favour of Life. But pray let us consider how this matter stands: Let me desire those Gentlemen that are of Opinion we ought to have so much Tenderneſs for the Prisoner, to lay before them another Scene, and sort of Consideration. At the same time, I do consider the Hardship (if I may use that Expression) of passing this Sentence, I do consider what a Condition we had been in, if the Contrivance that was laid had taken effect; that is the weightiest Part of the Matter before you: And though it was disappointed then, I know not how far off 'tis at present; this ought really to weigh with you. And I hope I may take leave upon this Occasion to observe to you, what one of the wisest and best of the Romans said upon an Occasion of this Nature; he tells you, That a Man that would consider his Duty aright, must consider the Matter in all its Parts and Circumstances; and when that is done, must act adequate, as well to the Community, as to himself and his Neighbour. I would apply that to the present Case; and would desire those Gentlemen that express so much Tenderneſs in this Case, to have some for the Government, and themselves.

It is told you, That the Prisoner before you does not stand convicted of any Crime: It was told you at the Bar, That the most we ought to pretend to, is

no further than to leave him in the Condition we found him: I think, with Submission, the Prisoner stands convicted of High Treason, with the highest Conviction upon Earth, and that is, the general Consent of all Mankind; for I will be bold to say, I do verily believe, that there is not one Gentleman within these Walls, nor that walks the Streets, not a living Soul, that doubts of his Crime. But, Sir, I would put this Matter yet further; I am not only satisfied in my own Conscience and Reason, of the Justice of your Proceedings, which ought indeed to be the Foundation of every Man's Opinion: But I am satisfied, that in this Way, there is no Hardship imposed upon Sir *John Fenwick*, if he will be his own Friend: For, upon what hath passed in this Proceeding, before Things are brought to the last Extremity, if Sir *John Fenwick* be his own Friend, if he be so much a Penitent and Friend to the Government, and to Posterity, to tell Truth, and leave off his Dissembling, and be plain, I doubt not but he will find Favour. Now, Sir, I would beg leave only to Answer one or two Objections; for some Things that have been said against the passing of this Bill, I do not think material.

One Objection that seems to me to carry the greatest appearance of Weight, was made by one of the Counsel for the Prisoner. He said, it would look strange in after Ages, that the same Parliament should pass the Bill for Regulating of Tryals in Treason, and this Bill of Attainder. Sir, I desire you will please to observe how this Matter stands; and in the first place, as previous to that, I take leave to observe a few things: 'Tis a Proposal generally agreed of, and not to be denied, That that which is designed for the Preservation of any Creature, ought not to be made use of to its Destruction. Now this Treason Bill was designed for your Preservation, to skreen you against the Danger of Arbitrary Power, and the Malice of False Witnesses; and this Bill of Attainder is brought
to

o skreen both you and the Government from your Enemies, both abroad and at home. And I think the Treason Bill is no Objection upon these Considerations : Besides, the Treason Bill was only made to be a Rule to Inferiour Courts. The learned Gentleman that spake last, told you, The Rules of *Westminster-Hall* were not Rules, because they were observed there ; but because they were grounded upon Reason. Why, Sir, in Answer to that, I will only take leave to tell him, That that which is Reason in *Westminster-Hall* does not carry the same Weight here. I think that Matter was so well explained by the Learned Gentleman at the Bar, that there needs nothing be added to it. He told you very well, 'Tis one Thing what I trust to do by my Servant, and another Thing what I do by my self. It is very obvious to any man's Understanding, if this Power were lodged in the Judges, what use they might make of this unlimited Power ; but no Gentleman can mistrust any Thing that shall be done by this House.

Another Objection that was made by the Counsel for the Prisoner, was ; says he, This is Evidence, or it is no Evidence ; if it be Evidence, then, says he, Why do you not Try him at Law ? If it be no Evidence, Why do you admit here ? Now, Sir, with Submission, this carries the Face and Form of an Argument, but if you take it a-peices, I think there is no convincing weight in it : For, Sir, the Reason why this Matter comes before you, is because by the absence of one of the Witnesses, according to the formal part of the Law, Sir *John Fenwick* will be acquitted ; but it is generally agreed, that the Consequence of so great a Crime going unpunished, may be dangerous to your Posterity. This Bill of Attainder is brought into the House, that you may supply that want of Form, you being convinced of the reality of his Crime.

Another Objection made by the Counsel at the Bar was, as to Capt. *Porter*, whom he reflected upon :
Says

Says he, Shall a man that hath owned himself guilty of such a Villany as the Murther of the King, of a sudden, have such Credit as to sway with you? I would take leave upon this Occasion, to repeat to you what my Lord Chief Justice upon the Bench did observe at *Charnock's* Tryal, (this same thing was urged and pressed home by *Charnock*,) and my Lord Chief Justice was pleased to take notice, That it consisted with the Wisdom and Justice of all States and Governments, to allow of such Evidence, because without it they could never come to the Knowledge of any Treason or Conspiracy: For he added, Who will you have an Account of these things from, but the Actors of them?

And therefore when they are penitent, and willing to atone for their Crime, by doing all the Service they can to the State, and Justice to Mankind, we ought not only to receive but encourage them.

When the Danger the Government would be in, if you did not pass this Bill, was urged; it was answered, But what Danger will you and your Posterity run in Passing of it? I think that Matter appears so plain and clear before you, that when all the other parts of the Question are passed over, I should think it a Reflection upon the House to enter upon a particular Answer to it: I have not said what I have said, that I think any part is decisive, but to clear my self to the World for the Opinion I am going to give, and perhaps what I have said, may give occasion to some others to say something that may be much more to the purpose; but for the Reasons I have given, I am for the Bill.

Mr. Sloane, Sir, I as little care for meddling in Matters of Blood, as any Man, and should be glad to avoid giving my Opinion in this Case; but I think 'tis incumbent upon every Gentleman that hath the Honour to sit here in Point of Trust; I think 'tis his Duty to them whom he represents, to the King and Kingdom in general, to give his Opinion when he is clear

clear and satisfied in it ; and if I was in the least dissatisfied, I should venture the Displeasure of the House to be absent ; but upon the whole Case, and the Proof that hath been given, I am very clear that Sir *John Fenwick* is guilty of this Treason that he is accused of ; and that it is Treason without any strain, and well warranted by Precedents.

I would first take notice of what is said to your Jurisdiction in general ; I remember it was said this was an Incroachment upon *Magna Charta* ; for by that, no Person is to be Tryed for his Life, but by the Judgment of his Peers. Those Gentlemen that have made that Objection, have entirely forgot the other part which is the next Sentence ; *Nec super eum ibimus, nec pro eo mittemus, nisi per legale iudicium parium suorum vel per legem terræ.* What do they make that to be ? 'Tis true, in the ordinary course of Justice Persons must be Tryed ; a Commoner by a Commoner, and a Peer by a Peer ; but there are several sorts of Tryals and Laws in the Land : And when you come to consider what is meant by *per legem terræ*, you have the *communis Lex terræ* ; you have the Statute Law, and *Lex loci*, the Laws of particular Mannors ; and there are several sorts of Tryals besides that by Jury. There are Tryals by Battle : The Defendant in case of Appeal may Try it by Battle, and he that is killed loses the Judgment. Then there is a Law above all these Laws, and that is the Law of Parliament, which my Lord Coke calls, *Lex Parliamenti* & *Lex Parliamentaria* ; in another place which he says, is, *ab omnibus inquirenda*, but *a paucis nota* ; and 'tis not fit it should be known how far they can go, (and so 'tis in *Chancery*,) and that of Parliament is a Law unlimited, and that is one of the Laws saved by *Magna Charta*, and is included in *Legem terræ* : I say therefore, that without any Incroachment upon *Magna Charta*, or any Law whatsoever, you enter regularly upon this Tryal.

I would

I would answer another thing that was said against a Tryal in Parliament, and I must confess I did wonder to hear it from that honourable ancient Member, That if he was to be Tryed, he should rather choose to be Tryed in *Westminster-Hall*. Why, Sir, before I should have given so sudden a Judgment as that, I would have considered what my Case was : If I had had such a Case as Count *Coningsmark*, a bad Cause and a great deal of Money, I would rather be Tryed there ; or if I could be Tryed as Sir *George Wakeman* was ; but if I had a good Cause, and would use no Corruption, instead of Twelve Men that might be corrupted, I had rather be Tryed by 4 or 500 Gentlemen that are beyond it. You see how Tryals went below ; the Tryal of my Lady *Lisle*, that could neither see nor hear, and there came a Person to her House that was proved to be in *Monmouth's* Rebellion, and she was burned for it.

Then as to the Case before you, I would first offer my Reasons why I believe this Gentleman to be Guilty. Here is Capt. *Porter*, he hath positively sworn, That he had another Meeting at Mrs. *Mountjoys*, and there they did consult and agree to send *Charnock* over to *France* ; and *Charnock* was directed to go with a Message to invite a Foreign Power over here. Now the Question is, Whether he is to be believed ? And I would go upon the same Reasons for believing a Witness, as they do in *Westminster-Hall* ; and will go as far along with those Gentlemen, as to the Credibility of a Witness : But if he be to be credited in *Westminster-Hall*, why is he not so here ? And therefore, if they had brought any Testimony against his Credit as made him guilty of Perjury, or Forgery, it had been an Objection against his Testimony ; but it was so far from that, that they did not offer to prove one Word of that ; but what was said, was said from the Counsel, and that is to go for no Evidence. The Counsel indeed did alledge against his Credit several things, but did not prove any ; and if they had, they would

would not have taken away his Testimony in *Westminster-Hall*, That is, that he was concerned in the late intended Assassination, and Treason. This was the same Objection that was made below ; and they brought Witnesses to prove that and some other things, but they did not weigh any thing ; for if it should be an Objection that he was in the Conspiracy, then you can have no Evidence of any Villany, for they will never trust honest Men with it. Therefore I do take it. That *Porter* stands before you as a very Credible Good Witness, without any Imputation whatsoever. Then Sir, say they, he is not upon his Oath ; that is an Objection to your Jurisdiction ; and though they say they own your Jurisdiction, yet when they say so, they speak against your Jurisdiction ; and by the same Reason you can go upon no Impeachment whatsoever ; for you can in no Case give an Oath. Then Sir, they tell you, he is but one Witness, and that 'tis in the Case of Treason, and there ought to be two Witnesses, and therefore you have Jurisdiction to do any thing whatsoever ; yet you have no Jurisdiction to go upon this Cause. Now, Sir, because this seems to be the most formidable Objection that is insisted on against the Proceedings in this Case, I beg your leave that I may fully Answer it.

And taking it to be true, that the Fact is proved but by one Witness, I conceive we may proceed in this Cause, though they can't in *Westminster-Hall* ; and I do take it, that there is a great deal of difference between one and the other ; and I do not take your Proceedings upon this Bill, being there is but one Witness, to be any strain, but what you may extend the Legislative to, without going beyond what hath been done. I therefore beg you to consider what the Law Originally was as to Treason, and how it came to be altered. Before the Statute of 25 *Ed. 3.* it was uncertain what was Treason, and what was not ; then the Statute came and reduced it, that as to all

Inferiour

Inferiour Courts, these are your Treasons, and no other shall be adjudged so; but the Parliament reserved to themselves a Power, that if any Case should happen like them, they were to Determine it themselves. So, Sir, that at that time, and after that time, one Witness was good in case of Treason; as now 'tis at this day for Robbery, Felony, or any other Fact but Treason. And till 1 Ed. 6. one Witness was good in all Treasons: Then comes two Statutes in Ed. 6. time, and the first takes notice, That since 25 Ed. 3. by several Statutes Treasons had been made which were unreasonable, and therefore Repeals them, and makes several new Treasons. Then comes a *Proviso* at the end of it; *Provided always, That no Person whatsoever, after the first of February then next coming, shall be Indicted, Arraigned, Condemned, or Convicted for any Offence of Treason, &c. unless the Offender be Accused by two Sufficient and Lawful Witnesses; or shall willingly, without Violence confess the same.* Now that *Proviso* relates only to the Treasons particularly mentioned in that Statute. Then comes the next Statute 5 Ed. 6. and pursues the same Words: But now this did not mean any Facts whatsoever that were left to the Judgment of the Parliament, because those Facts were not within their Cognizance. They are not Parliamentary Words, *Indicted, Arraigned, Convicted*, but only used by the Courts below. So that Cases in Parliament are neither within the words or meaning of the Statute which requires two Witnesses. Why, Sir, if it be so, that one Witness is sufficient, here you have not only one Credible Witness, but he is propt up extremely well by Collateral Circumstances; and though I do not allow that below they can proceed upon one Witness with Pregnant Circumstances, yet for the Reasons given, considering how this Evidence is propt up, I think it is sufficient before you. For there was another Witness against him, and it hath been proved what that Witness could have said if he was here; and 'tis plain that Men have died upon

the same Testimony : I must confess, when I was for Reading of *Goodman's* Examination, &c. I was not for Reading them as Conclusive Evidence, nor do I think them so in any sort, either the Conviction of *Cook*, or *Goodman's* Examination before a Justice of Peace ; but it is a stronger Evidence in this Case than any other, because the Witness is not dead, nor is he withdrawn by the means of any body but the Prisoner, or his Friends ; which, as I take it, appears upon the Evidence ; and if so, I think it comes to the Case, That if any one gets my Deeds, if he will not produce them, they shall be presumed to be what I say they are : I must confess, the Acting of his Wife or any Agent, might not be Evidence, if it appeared they did it officiously without his Knowledge ; but being *Clancy* said he came from Sir *John Fenwick*, and it was for Sir *John Fenwick's* Advantage, I will believe it was by his Privy : And for my self I think it no strain, if in this Case we take him to be a good Second to Captain *Porter*, though it ought not to be admitted in *Westminster-Hall*.

Then 'tis said, That you have no Jurisdiction to proceed by Attainder in this Case, where the Person does appear. and he is in the Hands of the Law, and ready to take his Tryal. I quoted you an Instance the other Day, 12 Car. 2. of the Regicides, where they Attainted Persons that were dead, without Examining one Witness, and I have viewed all the Books since, and there's nothing appears, but the Bill Ordered to be brought in, one Reading, and then another, and some Petitions for making of Savings : There is one Rank of People that were dead, a second Rank, which as you were told from the Bar, were the King's Judges ; some of which, it is true, were Tryed by the Law, but how ? Not by the Direction of the Parliament ; it was before they came into the Hands of the Parliament, and the Parliament takes notice that they had been Tryed. There was another sort that was never Tryed, but absented, and
though

though they might have come into the Hands of the Law, and been Out-lawed ; the Parliament took Cognizance of them, and Attainted them of Treason. Sir, I do take notice, that there was a fourth sort of People Attainted at that time ; (for if we were confined to the Rules of *Westminster-Hall*, no doubt we could not give a lesser Judgment than that for Treason.) There was the Lord *Mounson*, Sir *John Danvers*, and others, and the Statute recites that they were concerned in the Murther of the King, yet in regard so many had actually suffered, they did not give them the Judgment of Treason, but to forfeit their Estates, &c.

This is to shew you the Jurisdiction the Parliament have over Offences, and how they can alleviate the Punishment according to the Circumstances as they appear before them ; therefore I think this is a plain Proof that we have a Jurisdiction to go on with the Bill, and at the same time, I say this, I would put it out of the Case, whether the Prisoner be a little Man or a great Man, that is not in Judgment before us ; and I would put it out of the Case, what a good thing his Discovery would be ; I do not think that a good Argument, neither do I think it any Argument if this Man escape, what Danger we shall be in ? But I do give my Judgment from the Argument of his Guilt, and our Jurisdiction.

Mr. Pelham. Sir, the Learned Gentleman that spake last, seemed so very clear in his Opinion when he began to speak, that I was in hopes he would have given me and every body satisfaction in this great Point, especially when he began with *Magna Charta*, which says, that every Man shall be tryed by his Peers, or by the Law of the Land ; I do take it to be part of the Law of the Land, That no Man should be condemned for Treason without two Witnesses ; but after that he did lay his Finger upon the Sore, he told you the great Objection was, That the Courts of *Westminster-Hall* are so governed and tied

down, that they can't pass any Sentence for Treason, but upon two Witnesses; and he told you, we ought not to be tied so; indeed he did say we were not tied so. But I own to you, he did not give me any satisfactory Reason why we should not be tied so. 'Tis said, we are not tied, and 'tis impossible we should, for no Act can tie the Legislative Power; and several Gentlemen have said, That though there are several Statutes that declare there shall be two Witnesses in cases of Treason, yet they do say. That in case of Attainder by Parliament, one Witness may be sufficient. Why may it not be thought that these Acts extend to the Legislature, as well as the Statute of *Edw. 3.* by which it is presumed, that the Parliament may proceed upon one Witness? And I take it, that there being no such hint, 'tis a Presumption that the *Lex terræ* does crave an Observation of it by the Legislative Power.

I did presume Yesterday to tell you, That Mr. *Algernoon Sidney* did stand upon it as his Natural Right, that they could not proceed against him, there being but one Witness; I did not bring his Case as Parallel to this, or think that his Authority should influence you; but he was a Man that had that Love to Liberty, and the Good of his Country, that he would not have said so, even to save his Life, if he had thought it inconsistent with either of them: But I have looked upon his Trial since, and there he does declare, That the being Condemned by two Witnesses, is the Law of God and the Law of Man, the just Law that is observed by all Men, and in all Places. 'Tis certain he reached even by these Words the Power of Parliament; When I do say Power, I do not mean, but that when such a Law is passed, all are bound by it; but in some sense we may say you cannot do what is not just for you to do: You can do but what is just and suitable to the Trust reposed in you.

The Gentleman says, he thinks it a strange Opinion of him that said he had rather be Try'd by a Jury,

Jury, than the House of Commons ; indeed if he could be sure of such a House of Commons as this, he might retract what he had said : But I have seen that done in the House of Commons, which hath not made me extreamly fond of that Tryal. I have sate here when six or seven Noblemen have been declared Enemies to the Kingdom without any Evidence at all, and the Reason was somewhat like what 'tis now. The Power of Parliaments was brought in as an Argument, then, and it was said; it was only in Order to an Impeachment, but no Impeachment followed, yet these Noblemen went with that Brand in their Foreheads, and if any Disturbance had been, they had been expoed to the Fury of the People : And though we are sure of this House of Commons, and may be of all in this Reign, yet I know not how Facts may arise, and what Parliaments we may have, and upon that account I am very unwilling a Precedent should be made, at least contrary to the usage in all manner of Courts whatsoever.

Sir Tho. Littleton. Sir, I shall not trouble you long in this Debate, that hath taken up so much of your time already, in the consideration of some Matters we have been upon ; though I did think your time not very regularly spent, till this Occasion offered it self : I hope therefore now it will take up the less of your Time. I see the great Matter that was insisted on before, is insisted upon still ; and I do think we may say it among our selves, though we would not let the Counsel, that we are tyed up in this Case by the Rules of *Westminster-Hall*. But I believe if that was the Case, and the Question was no otherwise, than whether or no we are tied up by the Rules of *Westminster-Hall*, it would receive a Determination that we are not bound up to those Rules.

But I will take leave to tell you what I think is proper for us to ground our Judgment on. I think the great Reason, even of those that are against the Precedent, why they did admit Sir *John Fenwick* to have

Counſel, and to examine Witneſſes, if he had any, and to croſs examine the Witneſſes, and why they were willing to hear Evidence on both ſides, in the Nature of a Tryal, the great Reaſon was, becauſe that in a Caſe of this great Conſequence, they would have the beſt Information they could obtain. Why did they deſire to be informed, but that afterwards they would lay their Hands upon their Hearts, and give their Judgment upon their private Opinion, Whether he was guilty or no? They ſay, We are not to give our Judgment upon our private Opinion, I always will. (It was not long ago we were not to have our Religion upon our private Opinion neither.) And when I am ſatisfied in that, I will rely upon it: Whether this be ſtrictly Legal Evidence, I do not lay ſo much weight upon it, as whether it hath ſatisfied my Conſcience; and I believe there is not a Man in this Houſe but is ſo, (upon what he hath heard) and doth believe that Sir *John Fenwick* is Guilty; and if we believe he is Guilty, I would be glad to know by what Rules in the World any Man can give his Vote againſt this Bill, being of that Belief. And I tell you, why I think every Man believes ſo; becauſe every Man in the Kingdom that hath not heard ſo much as we have here, does believe him to be ſo, and I can't think that their Representatives only ſhould be of another Opinion.

What Evidence have you had? You have had Captain *Porter's* Evidence, and that would be good even in the Inferiour Courts; and beſides that, you have the Evidence of what *Goodman* did ſwear before the Grand-Jury. You have heard what he did ſwear, and the Grand-Jury did believe him, You have heard likewise what he did ſwear in another Cauſe to the Petit-Jury, and they believed him, and convicted the Perſon upon it. And though this be not Legal Proof, ſtrictly ſpeaking, will any Body ſay that I have Reaſon to diſbelieve this Man, and think he hath ſworn falſe?

Ay,

Ay, but here is but one Witness, Gentlemen tell you. I will put you a Case where I believe this House would Attaint a Man without any Witness. Suppose two Persons had seen Sir *John Fenwick* kill the King, (I believe we should not have pulled him in pieces in a barbarous manner, but he would have had a Tryal;) and suppose before his Tryal the Witnesses had been conveyed away, if before that they had sworn this to a Grand Jury, and they had found the Bill, I believe this House would have Attainted him for it.

Sir, I do not think that we should stand upon these little Niceties, nor be bound by the little formal Proceedings of other Courts, when the Government is at Stake. We are sent hither to take care that the Publick Safety do not suffer any Mischief from the Enemies of it: We have had Plot upon Plot, and I have heard so much said on behalf of the *Lancashire* Plot without Doors, that I wish we do not get an ill Name upon our selves before we have done. We have this Power to exert upon extraordinary Occasions, and here is a Man that hath endeavoured to subvert the Government, and Well-being of them that sent you hither. I hope you will use it now; and if they knew who were not of that Opinion, I believe those that sent them, would hardly send them any more.

Mr. J. Howe. Sir, as to what is said, That if it were known how we gave our Opinions, who are against this Bill, the People would not chuse us again; I am not afraid of that, I have been told so often, and yet I find the People I live amongst, use me better and better every day; and I believe, Sir, they will desire to use me, when they will lay other Men aside. I must in some measure support what was seemed to be reflected on, spoke by an Honourable Gentlemen, in that he said, he had rather be Tried by Twelve, than by Four Hundred. I am of his Opinion, and this is my Reason for it; I have my Lawful Challenge in a Tryal by a Jury, and if there

be any on the Pannel I have offended, I can except against them, but that can't be done in any Case here, if it might, I suppose Sir *John Fenwick* would desire those he has named in his Paper, might not be Judges whether that Paper were true, and he to be Attainted for delivering it to the King. But Gentlemen put the strels of their Argument upon that which no body denies, and prove it handsomely, and well they may; for it is self-evident, the Power of Parliament they insist on, and no body Pretends but we have a Power to do what we please: But I must say of that Power, what *Bracton* says of the King's Power, *Hoc tantum non potest facere, quod non potest juste facere.* And 'tis a strange Reason to urge, that we should do a thing of this Nature, because we have a Power to do it. It is said, we are not tyed up to the Rules of *Westminster-Hall*; we are not so: But I beg leave to tell them, that what is Reason and Justice in *Westminster-Hall*, is so every where: And I do take these particular Points we speak of, to be grounded upon Reason and Justice, and so far we are as much obliged to pursue them as they in *Westminster Hall*.

Two Witnesses are required in Cases of High Treason, by our Law, that the People of *England* might have all possible means of defending their Lives against unjust and malicious Prosecutions; And this was ever thought conformable to the Laws of God, and the Law of Reason.

But truly, Sir, we are going a little further; the Gentleman before told you, there was no need of two Witnesses, one would serve; but now we are told, there needs never a one at all; for I do say, if every Gentleman here is to be guided by his private Opinion, and not by Proof, we need not have spent all this Time: I suppose every one of us did conceive in his private Opinion some Judgment of the Guilt of Sir *John Fenwick*, upon the first News of his being in the Proclamation, from the Character of the Man, as well as other Circumstances which

at that time might occur. Now, if there be no certain Rule by which we are here obliged to guide our selves in Matters of this Nature, why might we not have given Judgment on him upon our private Opinions immediately? How does it become more Lawful, or more reasonable by what we have heard at the Bar, if it be justifiable to Condemn, because we barely think him Guilty, few of us have, I dare say, changed our Thoughts as to that part. But if, as I stedfastly believe, no Man ought to suffer, whose Guilt is not proved (which word admits of no degrees of Comparifon) I think that's no more performed by the Counsel at the Bar, than 'twas by him that drew the Proclamation, and as fit for us to determine, by the one as by the other. But 'tis said the Bill of Treason was intended only to Limit *Westminster-Hall*, and that one may trust such Power with ones self as may not be fit to be reposed in a Servant. Truly if there were a necessity, that either I, or my Servant, must commit a very great Injustice, I had much rather 'twere done by my Servant, than my self; and I should not think it an Advantage I ought to value, to be left at Liberty to commit a base or wicked Action, which my Servants were restrained from. We have indeed taken care, that the Subject may not be oppress'd by Arbitrary and Unjust Methods below, but if we give this Example, we do, I think, little less than introduce the same into this House, to be practiced here as often as Ill Ministers, and Corrupt Members may hereafter think fit, to the utter Ruine of our Posterity, who may thereby upon all Occasions be deprived of the benefit of that Bill of Treasons, or any other Law whatsoever, even in that great Point, in which all Liberty and Property is concluded, the Right to their Lives. It is therefore much better, that every hainous Fault or Mistake, be committed in *Westminster-Hall* many Years together, than once within these Walls. Judges can only break, or offend against the Law, but by so doing, though they

they may injure many particular Men, do no more prejudice Original Right, than a private Man that Murders his Neighbour, and are equally liable to Punishment in their several Stations. But this House hath no Superiour Power, so that what is here done in this Nature, becomes a Law ; wherefore a Parliament only, as it hath been often observed, can make this Nation unhappy, because a Parliament only can Establish Arbitrary Power and Misery by Law.

As to the Evidence, Sir, since every body hath spoke to it, for my part, I must declare to you, That the more I have heard of this Tryal, the greater my Doubts have been concerning what these Witnesses pretend to know of Sir *John Fenwick's* Guilt. I have heard Captain *Porter* give his Evidence, but that is no sufficient Proof to me. I have heard what Evidence *Goodman* did give to the Grand-Jury : But whether they did ask such Questions, as I should have done, or did confront him with other Evidence, I can't tell. Therefore though the Grand-Jury was convinced by it, it is no Reason to convince us ; because 'tis possible we might not have been convinced by the same Evidence. But to go further, there is very great Reason to believe that *Goodman* was not then at this Place, and that not one word he says is true. I am credibly informed, that at *Cook's* Tryal, there were three positive Witnesses as could be, that he was not at the Place when he swore he was. And I observe a little failure in Capt. *Porter's* Evidence in that Point ; for I do not think it proved by Captain *Porter*, that *Goodman* was by when this Discourse was ; he says, he spake of this Thing at Mrs *Mountjoy's*, and Dined there.

Members. No, no : It was at the *King's-Head*.

Mr. J. Howe. Well, there was but one Place where it was. Now whether Captain *Porter* heard them talk of it before *Goodman* came in, or whether *Goodman* was present at that Discourse, he having ben there but the latter part of the Time, (when it
seems

seems to me they should have given over the Talk of such Business, they having been so long together before) is not very clearly made out. In the Case of my Lord *Delamere*, there was one positive Witness, and a Circumstantial Evidence, and yet that was not thought a convincing Argument by the Lords to find him guilty, and I hope no Consideration will oblige us to do that, which I am sure we should have blamed them for doing.

The Consequence of this, Gentlemen say, they do not fear. I believe if Sir *John Fenwick* had been told when he was Major-General of King *James's* Army, that I should come here to sit upon his Life, he would have laughed at it, and thought it as impossible as Men in great Posts now may think the like Fate ever to befall them; but the contrary has happen'd, and I have seen Parties persecute one another with such Violence, that at one time or another every body hath been in Danger of a Proceeding of this sort against them, which surmounts all we can think of, extends beyond all Pardons, and will reach beyond the Act of Indemnity. God knows who may be served so, notwithstanding all the Acts of Indemnity. Sir, there is one thing that is said further, which the Gentleman at the Bar concluded with as a substantial Argument, that we do not aim at Sir *John Fenwick's* Blood, (God forbid we should) but at his Confession: You here read the Bill once, and twice, will commit and pass the Bill, (Sir *John Fenwick* not confessing) and still this is not to aim at his Blood; perhaps this Man knows no more of this Matter, yet is he as it were racked even to Death from Reading to Reading, because he does not confess, and at last he comes to be Hanged, Drawn, and Quartered, instead of High Treason, for not confessing it.

This I take to be the most dangerous part of all the Arguments that have been urged; for this I must tell you, That according to my private Opinion, I do believe that Sir *John Fenwick* does know of no more Persons

Persons concerned, (nor does he pretend he knows all that he says :) He tells you, He hath not been a Man that hath kept Company with Great Men. I have heard he hath generally conversed with, and relieved the poor *Jacobite* Officers : There is Five People, as I take it, he hath told you he did converse with ; I would fain know in what Plot any Man converses with above Five of the Plotters. There may be a Plot that may be most dangerous, and yet a Person that knows of this Plot, may not know above two or three others that are concerned in it. But the great Argument is, Take care of your Government. In the first place, they must suppose the Safety of the Government depends upon his Execution ; Or why do they use it as an Argument ? But how does it appear the Government would be in danger by not Passing this Bill ? Do you want Examples of Punishment to deter Men ? No ; you have had lawful Proof against Four or Five Persons, and they have been executed. Here are Examples made, that nobody for the future may presume to conspire together, and not to be executed ? What is the Reason of this Bill then ? Why, there is a Plot going on. Sir *John Fenwick* hath been imprisoned these Six Months and more, will you hang him because there is a Plot now going on ? What Consequence is that, do you think, that he knows any thing of it ? It may have been started since his Confinement ; so that to what is pressed of his Confession, I know no one thing would be gained by it that could be useful to the Government. Will you then proceed to a Bill of Attainder, unless the Matter be of the greatest Consequence ? The Preamble of the Bill for Attainting the Duke of *Monmouth*, gave a substantial Reason for it, That he was in Arms, And could not be brought to Justice. That implied, that if he could have been brought to Justice, they would not have attainted him. For my own part, could I approve this way of proceeding, which I take to be both unjust

just and dangerous, my private Opinion shall never guide me in such a Case ; 'tis not the same thing with that my worthy Countryman put in Matter of Religion ; my private Opinion does not affect other Persons : If I mistake in that, I only suffer, tho' it be some Justification, being the Rule appointed by God for us to go by. But where private Opinion may be a Pretence to exercise private Malice, Revenge, Avarice, and Ambition, to the destruction of others, 'tis no way fit Mankind should be mutually subjected to the one, who are so much inclin'd to the other. Law has therefore been appointed for the Common Safety of all our Lives, Liberties, and Estates, a certain Rule by which we ever thought we held 'em, and without which we ought not to lose 'em ; if that Rampart be torn down, and the Arbitrary Power of Private Opinion established in its room, be that plac'd where it will, 'tis a greater Blow to our Constitution than any we have hitherto been threatned with : It is not, I fear, in my power to restrain it, but I think it yet better to suffer by it than consent to it.

Mr. Norris. This is a very Solemn Debate, and 'tis upon a very Solemn Occasion. 'Tis a Case of Blood ; 'tis a Case that in my Life-time, I thank God, I never had to do with yet ; and in this Matter wherein I am now to be a Judge, I will use as much Caution as any Gentleman within these Walls.

I am so conscious of my own Inability in what I have to say, that I can't expect to Convince any body ; but what I say, is to discharge my own Duty, and satisfy my Conscience in that.

I doubt not, but every Gentleman considers the Station that he is in, and the Trust reposed in him by those that sent him hither : We are entrusted with the Lives, Liberties, and Properties of every Man in *England* ; and we are answerable for them to those that sent us hither, to our Posterity, and to our selves.

In this Matter, many things of great Weight and Importance are before you ; here is the Life of a Man, the Preservation of the King and Government, and the Power of Parliament to be considered. Sir, as I shall be Cautious of taking away the Life of a Man, so I shall be Careful of the Preservation of the King and Government, and the Power of Parliaments ; and though I do not think it requisite, nor never will give my Consent to Support the Government, or Honour of this House, at the Expence of Innocent Blood ; so I shall not be afraid of giving my Opinion in this Matter to bring a Criminal to Punishment, who, besides the Treason he hath committed, hath Crimes of a Nature almost equal to Treason ; and for which, because he hath evaded the Cognizance of *Westminster-Hall*, he is now brought before you ; and there are several Instances, where this House hath taken notice of Offences of a less Nature, and for a less Reason than this is that is now brought before you.

To Quote Precedents, is a little dry Subject ; but however, I will Instance in one, that (I think) does Assert the Power of Parliaments in this Case, which has not been mentioned yet ; and that was (as I remember) in the 3 *Rich. 2.* of an Agent that came from *Genoua*, who was (by a misfortune) killed upon a Quarrel that happened in the Streets. He that killed him was brought to his Tryal, (it could not be brought within the Statute of 25 *Ed. 3.*) and it was found only *se defendendo* ; but he being a Publick Minister, it was thought fit that the Nation should take more notice of it ; and he was Attainted afterwards by Parliament, and there is a Record of it. They did not think fit to make a General Law, but they made an Example of the Man that committed this Fact.

A great many Gentlemen have supposed this, and supposed that, and what ought not to be supposed ; but I will make an easie Supposition : I will suppose
that

that we are the Commons of *England* in Parliament Assembled, and if so, Sir, we have a Discretionary Power to do whatsoever we see is for the good of the Kingdom ; and if we are to be circumscribed by the Rules of *Westminster-Hall*, and are to do nothing but what they could do, to what purpose do we sit here ? If we are intrusted with this Power, and may Exert it, I think here is a fit occasion for you to Exert this Authority.

Sir, give me leave to take notice, That the strain of Argument that was used some Years ago, is very much altered by the same Gentlemen ; (I will mention it) I think it was in 78, when the Bill of Exclusion was brought within these Walls, the Argument ran then (for I have seen them in Print) Those that were against that Bill, What will you do ? Say they, Will you do this thing ? Pass a Judgment against a Man without Hearing of him ? Hath he been brought to your Bar, to Answer what you have to say against him ? How do you understand that he is guilty of the Crimes you Accuse him of ? And they did use those Arguments against them that were for Dismissing the Duke of *York* ; but the Answer then was, Do you Dispute the Power of Parliaments ? Is there not a Discretionary Power in the Parliament ? I do take notice, That those Gentleman that used that Argument for the Bill of Exclusion, now use it a quite contrary way. Sir, I think the Power of Parliaments is not to be trifled with.

It hath been urged and said, a little while ago by a Gentleman, That he does not believe Capt. *Porter* is a good Witness. I will give you a good Reason why I do think he is a very good one, and they at the Bar think so too, because they would have given a great Reward to have taken him off ; and for the same Reason, I believe *Goodman* to be a good Witness too : For Sir *John Fenwick* was satisfied, that *Goodman* did know how far he was concerned, and he hath been prevailed with to be out of the way.

Sir,

Sir, here are a great many Circumstances that agree to well together. That (I think) no Person can doubt of Sir John Fenwick's Guilt; and (I think) 'tis in this Case in the Body Politick, like the Body Natural, when a Man is almost past the Cure of Physicians; when a Man hath a Gangrene, a Rotten Member, which the Physicians by the ordinary means can't Cure. if the College of Physicians themselves, in that Case were consulted, they would say, *Immedicabile Vulnus ense recidendum est.*

I am of Opinion, That the Legislative hath this Power, and that this is a proper Occasion to Exert it; and to compare small things with great, 'tis like Thunder and Vengeance in the Hands of Providence, that ought not to be used, but upon extraordinary Occasions; and then it ought not to fail. for a Man trifles and despises that Power that is not effectually able to Exert it self; and if the Sword of Justice be drawn, if Men find it rusty, and will not cut, they will have a mean Opinion of your Power for the future.

Gentlemen are afraid of Precedents in this Case; for that Reason I am for Committing this Bill, because I would make this a Precedent; and I will tell you why: Because it may happen in future Ages, that Ministers of State, and Persons concerned in the Government, may be faulty (I think I may suppose that) and as the Law stands now, he is but a bungling Politician, that can't ruine the Government, and yet not come within your Bill of Treason to be Hanged for it. And therefore for the keeping an Awe upon Ministers of State, and because I would have this House always have it in their Power to Punish future Offenders, as they shall see cause, as well as this unfortunate Gentleman at the Bar. I am for Committing this Bill.

Mr. Finch. Sir, the Question now before you, arises upon a Case wherein you have a Man Accused of High Treason, and for that there is but one Witness, which

which by the Rules of *Westminster-Hall*, is confessed by every Gentleman, to be not Legal Evidence.

I remember the other day, when this Evidence was offered, and an Objection made to it, the Answer was, That we ought to hear it (though in *Westminster-Hall* they could not do it) 'cause we sit here as Judges, and we can distinguish what is Legal Evidence, and what is not Legal Evidence, and can give its just weight to every part of it : I do observe now in this Debate, some part of the Evidence, which no Man can say could have been given according to the Rules of Law, if insisted upon, and weight laid upon it.

And here they have taken into Consideration the Power of Parliaments, and the Method of Parliaments has been insisted on ; as to the Power of Parliament, Whether the Parliament can do it ? And whether if the Parliament pleases to do it, they are tyed up (as Gentlemen are pleased to express it) to the Rules of *Westminster-Hall* ? That the Parliament can do it, 'tis a hard matter to gainsay, That any thing is out of the reach of the Supream Power of a Nation ; The Legislative Authority can do every thing : Yet though Gentlemen have said this, and others have observed, That there wanted no Authority to prove this being Self-Evident ; yet give me leave to instance in some particular Cases, with the Authority of the Judges upon them, where the Parliament have proceeded according to the Rules of *Westminster Hall*.

We Read in H. 8. Time, That the Lord *Cromwel*, Earl of *Essex*, was Attainted in Parliament ; and History tells us, That he was Attainted by a Law of his own making. Now, says my Lord *Coke*, That seems strange ; but enquiring of an Ancient Person that lived in those Days, he told him the meaning of it ; That Lord had consulted with the Judges, Whether or no, if a Man was Attainted by Parliament, and was not brought to be Heard, such Attainder would be good in Law ? The Judges startled at the Question, but told him they could give no other Answer than this : Truly, if such

Attainder be made, we know no Law to find fault with it, for 'tis done by the Legislative Authority. It fell out, That the Instance of Condemning a Person in Parliament (not according to the Rules in Westminster-Hall) fell out to be that Noble Man's own Case; for he himself was so Attainted immediately after.

Give me leave to Instance in another kind of Authority; the Authority of Parliament touching these Attainders, and what has been the Consequence of them. If you will look into the Records of *Rich. 2. Time*. I do not mean the Records that have been quoted, nor the Case of *John Imperial*, for killing the *Genoua* Embassador, which was declared Treason in Parliament, Ten Years after the Man had been Tried in *Westminster-Hall* for it; but I mean the 11 *Rich. 2.* how many were Attainted by the Proceedings of those Times? I do not mean by Acts of Parliament, but those Attainders were in an Extraordinary manner, not according to the Rules of *Westminster-Hall*: And 21 *Rich. 2.* the whole Parliament and its whole Proceedings were Reversed, and the Parliament Annulled: In that Year were the Prosecutors of the 11th. Year themselves Attainted: And 21 *Rich. 2.* the Act that Repealed that Parliament, Repealed the Pardon too. But in Order to come to the Attainder of those Persons, That being done, was not enough; for the Lord *Arundel* had a Pardon the 17 of *Rich. 2.* upon that they made a Law to Repeal his Pardon by Patent, that they might come to the Attainder of that Lord; and that Lord was Attainted by Act of Parliament: But I must observe one thing a little further, That that very Parliament, that doubtless knew their own Power well enough, and that their Attainders were firm, being made by the Legislative Power; yet they had a little Jealousie themselves of their Proceedings; for they passed an Act to make it Capital to go about to Reverse any of those Laws, and another Act, that all the Lords and Bishops should be Sworn. Now see what fell out after, *Rich. 2.* was Deposed,

Deposed, for Consenting to those Laws; Henry the Fourth, in the first Year of his Reign, Abrogated the whole Parliament, and Repealed all those Laws: These Turns have been upon these Extraordinary Proceedings of Parliaments.

Give me leave to give you another Instance, and that in another Case, as odious as possible could be. In the Murther of *Edw. 2.* there was *Roger Mortimer* Attainted in the first Year of *Edw. 3.* and the Record says, *That it was Notorious to them all:* And what then? They adjudged him to be Attainted in Parliament: When Time had a little worn off that Extraordinary Zeal, (which truly was commendable, tho' it had transported them a little too far beyond the Rules of Justice;) and they came to consider what Precedent they had made for Posterity, it had another face; for in 28 *Edw. 3.* was that Attainder Reversed, because he was not brought to Answer, as he ought to have been. There was also an Act for Attainting the Earl of *Arundel*, which in the same 28 *Edw. 3.* was Reversed, because he was not brought to Judgment by due Process of Law.

But now we are told, we are not tied here to the Rules of *Westminster-Hall*; Gentlemen do not enough distinguish in this Matter; the Forms of *Westminster-Hall*, say some; the Rules, say others; and others say there is no difference between the Form of Proceedings, and the Rules of *Westminster-Hall*: But I hope no Gentlemen do think but the Parliament, though they have a Power to act as they think fit, (as Instances have been given) yet the Parliament it self are tied by the Rules of common Justice. Now I would have Gentlemen that say we are not tied to the Rules of *Westminster-Hall*, a little to consider the Matter. Are the Rules of *Westminster-Hall* no other than what are necessary for the Executing of Justice? If they are no other, How can we be said to go according to Justice, when we go beside those Rules? I desire them to consider of the Consequence of this

Proceeding ; there is no Danger, I hope, of this Parliament : But if we shall say, that the Rules of *Westminster-Hall* are not such as are necessary for the Proceedings in a Course of Justice, we shall shake those Barriers off our Liberty and Property, I am afraid, a little more than Gentlemen think of at present ; and shall we declare they are not necessary, when our Ancestors have thought them so, and their Wisdom have derived them to us, and the Wisdom of the Nation in Parliament have Established these Rules !

I can't say what Consequence may follow upon this. This Parliament can never do any thing to endanger the Lives of the People of *England* ; but heretofore Parliaments have been damned with several Brands set upon them by succeeding Parliaments. As for Instance ; One, I think, in the 38 H. 6. or 39. That Parliament was wholly Repealed as Packed, and passing Laws through Rancour and Malice, and having passed no Good ones. Now suppose a Parliament should come, that should not be so tender of the Liberties of the People as this ; and they should be so bold as to shake those Laws that are made for the Rules of Justice, if they have so good a Parliament as this to guide them in it, Will not this be an Inducement to such a Parliament as that, to shake all your Laws and Liberties ? But I can't trouble you any longer, my Head will not give me leave. I am against the Bill, and have offered you my Reasons.

Col. Wharton. I hope Gentlemen in a Matter of this Moment, will have Patience to hear one another ; and since every Gentleman is to give his Vote in this Matter, I desire to give my Reasons for my Vote : I am of the Opinion of another Gentleman, That we have not touched the Sore yet, but I do not think that the Rules for *Westminster-Hall*, are Rules for us. The Gentleman that spake last, as he always does, made a very Florid and Elegant Speech, and brought you several Examples of Attainders that have been condemned from one Parliament to another, in several Reigns.

Reigns. But I do not wonder at that, when the Crown went from one to another. An Instance was given in the Case of the Lord *Cromwel*, which was spoke too from the Bar; and Sir *Tho Powys* laid a great stress upon it, That this was condemned as a wrong Judgment, because he was not heard: I believe that may be a Reason why many of those Attainders were condemned; perhaps it might be a Custom of our Ancestors to pass Bills of Attainder without hearing the Party: This Person hath been heard, and fully heard; and I believe no Person that hath been Attainted, hath had so fair a Tryal; and therefore Parliaments having condemned Bills of Attainder, because the Persons have not been heard, that will be no Reason why any Parliament should Condemn us. A Gentleman told you, That the Law of God and Man was not to Condemn a Man, but upon two Witnesses, but there are many Instances to the contrary.

It is told you, That *Porter* here before you is not a good Evidence, because he is not Sworn; and that you are to go by the Rules of *Westminster-Hall*. Says the Gentleman that spake last, you are to go by their Rules, but not by their Forms: I must confess there is a great difference between them two; for a Form is only the Manner or Method by which we proceed in doing of any thing; but the Rule is the Foundation we are not to Err from, but I can't agree; we are upon the same Rules as *Westminster-Hall* is. The Rule of *Westminster-Hall* is, when a Man is brought upon his Tryal, the Jury are all to be upon their Oaths; by which Oath they are to make a true Judgment according to Law: This is not the Case here; if I was a Jury-Man, and was to try a Man, and one Witness Swore against this Man, and no other Witness, though I did in my Conscience believe him to be Guilty, yet in that Case my Conscience is discharged, and I must find him Not Guilty: But no Man, can say this is the Case here.

What are we now a doing? Here is a Bill to Attaint Sir *John Fenwick* of High-Treason, if I reject the Bill, I do declare him not Guilty; and if I do think him Guilty, I do thereby declare against my own Judgment; for my Judgment here, is not bound up as a Man's Judgment upon a Jury; for his Judgment is bound up to Proof, according to Law; and my Judgment is bound up by my own Belief: This is the Proof I must go by; and I think every Man is bound in Justice and Duty to his Country as he believes Sir *John Fenwick* to be Guilty, to be for the Commitment of this Bill; and till any Gentleman will convince me, that this is not a Rule I am to go by, I must continue in this Opinion.

Mr. Boyle. The Disorder that worthy Gentleman was in, makes me the more concerned for fear of falling into it myself.

I hope in this Debate, Gentlemen will be very cautious of using it as an Argument, what Acceptation our Votes shall have without Doors, and with those we Represent, when we are to give Judgment, as far as in us lies, of the Life and Death of a Man; and therefore I must observe, that the eagerness that is justifiable upon Impeachments, may not look so well now we are Judges upon a Bill of Attainder. You have gone over the whole Course of the Evidence, and I believe that this Debate will shew you pretty plainly, what is to be the Fate of this Bill, for I believe all the Arguments will be now used that can be. As to what hath been said of extorting a Confession, I take it to be quite out of the Case.

I am sorry to be engaged one way or another, I would not, if I could help it, out of the House, be upon a Jury of Life and Death; yet in that Case, I should know the Law, or be told it by the Judges; but in this Case, we are both Jury-Men, and Judges, and know not what Rules we are to go by; but set up a Court of Equity which hath no Bounds, but our own Consciences.

As to Sir *John Fenwick*, I know him not ; as to his Cause, I am sure I am against it ; but how far I think him Guilty or not, I think is not the single point to be considered ; I must confess, there have been several People accused of this Conspiracy, and have been named by the Evidence at the Tryals ; and I believe they are much alike Guilty, being upon the same Evidence ; but as to all that hath been opened before you, and proved, it can amount to no more than this ; there is but one Evidence, which by the Law would be admitted to be a good Evidence to convict him in another place ; and therefore I do agree with the Gentleman that spake under the Gallery, that this is a very Extraordinary Case ; for one Witness is not sufficient at Law to Convict him, and the Law would be very different here. If I am to judge according to my own Opinion, and not by the Rules prescribed by the Law ; but though this Proceeding is not strictly according to the Law of the Land, yet if it was such an extraordinary Case that required you to dispense with those Forms, and come to this extraordinary Manner of Proceeding ; I think, for my own part, it might be supported by the necessity of it, for 'tis impossible that it should be otherwise in Practice, That when the Government is at Stake, and nothing will preserve it, but the breaking through the settled Forms ; but the Government will break through them, and whatever Rule you prescribe, it will always happen so.

There is a very extraordinary Case, and that was in the Conspiracy of the State of *Venice*, above a Hundred Years ago, I think, set on foot by the *Spaniards* ; then the State, to get the whole Matter out, promised a Pardon to as many as were concerned in it ; and after they had promised it, and treated with them about it, they thought it necessary, for the Preservation of the Whole, to break their Faith, and they were all put to Death. This was upon Point of Preservation of the Government.

But, Sir, as to Precedents, give me leave to say, I do not give that Authority to them, unless I knew all the Springs, and secret History, and Transactions, that were their Guide in making those Precedents, and as to Precedents that have been quoted, when the Parliament have declared what was Treason, and what was not Treason, or have declared constructive Treason, they may be grounded upon the Statute of 25 *Edw* 3. But I think there is no Statute upon which they can ground the Condemnation of a Man upon one Witness.

In the Case of my Lord *Strafford*, upon Constructive Treasons, it was there said, That it was a Fire that had lain hid for 240 Years; and that it never brake out before, but to consume him and his Posterity. It was answered by *Pym*, If that was the Case, it was not for want of Law to justify such a Proceeding, but all that time had not produced such an Offender,

I do not doubt, but if any one will consider the late Conspiracy, and if that was the Question, but it was as Extraordinary as any thing can happen: For it was to subject the Country to a Foreign Power, which is very extraordinary, and several Persons were concerned in it: But there is one extraordinary part which I do not remember this Gentleman is accused of, and that is, the Assassination, Treason it self is a very extraordinary Crime; but give me leave to say, that extraordinary part is not alledged against this Gentleman, and this Bill does not seem to be brought in for that, wherein he is concerned in common with some others, but for the subsequent Matter alledged in the Bill. This Bill is grounded, not so much upon that he is guilty, as a great many more are, as upon several Circumstances which have happened to no body else. Give me leave to instance in a Case, now in my Head; (I beg your Pardon that I ramble 'tis from the Awe I have upon me from this Assembly.) In *Cataline's* Conspiracy, and if that was
our

our Case, no doubt there would be another sort of Argument for it. There they consulted what to do with *Carthegus*, and the other Conspirators ; he was at the Head of an Army, which only expected his Orders to lay *Rome* in Ashes ; the Question was, Whether they should break the *Portian* Law ; and for the safety of the Senate, they were put to Death before the Assembly rose.

Now to come to this part of it, though Sir *John Fenwick* is a great Offender, yet I think his Case is not so extraordinary, as to make you proceed upon this Bill. I do take his living or dying not to be of that Consequence as this Bill of Attainder : I know not how he comes to be so considerable when in hold ; for when he walked about Town, I never heard he was feared or regarded at that time.

But to come to the Allegations in your Bill upon which you are to ground your Judgment : The first part is a New Conspiracy, that is, for intending to create a Jealousie between the King and these Noble Persons : As to them, you have already passed a Vote in their Justification ; and I think their Actions may justify them to the World, as much as any Vote of the House of Commons ; but whatever they may be, I think it was a Foolish piece of Conspiracy, as well as an ill one ; for one, when he was in danger of being Hanged for one Plot, to venture upon another ; and, I think, there was at that time two Witnesses to bring him to his Tryal, and that is an Allegation in the Bill. And as to the Protracting of his Tryal, 'tis Natural, and so justifiable, whether Innocent or no, and what every body attempts ; and no body can wonder at it, but in one Case or the other, it can be no sufficient ground to Attaint him.

The next thing that is said, is, that he hath been the occasion of the withdrawing of an Evidence. Now I must observe, That is not alledged in the Bill, and is proved but by Hearsay ; but suppose it was true, and alledged : if any Man concerned in Treason, shall endeavour

endeavour by Friends or otherwise, to get off an Evidence, Can that amount to that which is designed to be punished by this Bill? To High Treason? 'Tis the part of those that are entrusted with those Matters, to be in expectation of such Practices. What are Gaols for, but to keep them in Custody? And the People employed in those Businessses. are to take care of it. Are we to supply a Defect of what ought to have been done in another place?

So that I do say, That a Precedent in an Extraordinary Case, is no Precedent to be used in a Little Case; it may be urged, but 'tis but a pretence. When you have passed this Bill, which is the Record, the Matter will appear no otherwise than are the Suggestions of your Bill: A Man hath aspersed great Persons, which is a great Fault indeed, (for he is not charged with the withdrawing of the Evidence,) therefore Attaint him upon one Evidence; I think by this Bill, you will open a Door for a Precedent of all Treasons of the same Nature. Sir, there have been many Precedents mentioned, I will trouble you with none, because most Gentlemen have read the Argument of Mr. *St. John's*, in this Case: I must confess, unless there was that necessity as is pretended, which I do not see, I do not see how you can justify passing this Bill of Attainder, either by the Law of God or Man, in any Nation allowed.

I must confess, I have no manner of concern how this Question goes; what I have said, is more to satisfy my own Judgment, than work upon other People; I am not satisfied, there is that necessity that is pretended; and therefore as my Judgment is now informed, I can't give my Vote for the Committing of this Bill.

Mr. Smith. Sir, I own my self to be very unfit to speak in this Argument, but since I am to give my Vote in a Matter of this Consequence, I beg leave to give my Reasons why I give my Vote, as I intend to do; I know the Matter before us, both in the Nature

Nature of the Crime and Punishment, as well as the Consequence of it, requires a very deliberate Consideration ; but at the same time, I do take the Hazard and Danger of this Government to be a Matter of great Consequence too.

Though there have been several Precedents instanced in, in Relation to Attainders ; and though I have observed, that most have acknowledged, That they might be justified upon Extraordinary Occasions ; yet when they have asserted that, they have told you, they were upon a wrong Foundation, and so were laid aside. Now I think it no great matter to say, That those Attainders that were made in Rancour upon Contended Titles, were Reversed when the Opposite Party got the Power : No more than if any Action, be it never so justifiable, should be Reversed when King *James* comes again, which I hope never will be. Is it any Argument, that when *H. 4.* came to the Crown, and Deposed King *Richard*, that he Reversed all the Attainders in his Time ? There might be Reasons might sway with Persons for Reversing particular Acts of Parliament, which might be very good, or might be not so, there was such a Change of Government at that Time ; but they take notice it was made a particular Article against *Rich. 2.* as if when the Power was come to other Hands, they would not have Deposed him if they had not had that Argument : Neither do I take that Argument to be of any weight ; That Attainders have been Reversed, because the People have not been heard ; when this Gentleman hath had as full a Hearing as ever any Person had upon any Bill of Attainder, or Impeachment whatsoever. And he hath had the Advantage of Counsel in this Case, which, as has been told you, was excepted out of the late Act of Parliament, and of the most able Counsel too.

'Tis said, this is a matter of no great Consequence, because it concerns Sir *John Fenwick's* Life singly ; and he is not thought to be so considerable, as by his Escape

to bring the Publick in danger. Now, it hath been always one Principal I have laid down, That if a Plot be discovered, and not thoroughly prosecuted, it strengthens and grows upon you, and ten to one if it does not Subvert the Government.

Now, God be thanked, that we have prevented the Design upon the King's Person, and several have been punished for it; but I think we are not gone to the bottom of it, and that we ought to provide against it in a much other manner. Can any one think that Sir *William Perkins*, or Sir *John Friend*, and the rest that are discovered, were the only Persons concerned in this Conspiracy? I take it, that there have been much greater Men in it; and when I see such a struggle both to get People out of Goal, and send People out of the Way, and all Arts used that can be; I must suppose, when such Extraordinary Courses are taken, that there is something Extraordinary still to be done; and I would not have Men by Bribing of Witnesses think to Secure themselves: It hath been used as an Argument to lessen the Matter, That this was a little after the Act of Indemnity, Can any thing aggravate a thing more? Sir, these very Arguments turn against them.

We are told here, that we must not Consult our own private Judgments in this Matter; and we are told at the same time, if there were two Witnesses that we did not believe, we must not find him Guilty. We are told of a Judge, that though he knew a Person to be not Guilty, yet it was a commendable Action in him that he Condemned the Man, but that hath been very well answered already, and I shall not meddle with it further; only this I will say, That I never will in any Case be a Jury-Man or a Judge, where the Convictions of my own Conscience shall not govern me, but an Evidence, that I do not believe. And because that Story was told you, I will tell you another, that I think more commendable, And that was, a Man was Tryed for a Murther, and there was

was positive Evidence against him ; the Jury went out, and staid a great while : There was Eleven against One for finding him guilty ; but at last the One almost starved the rest, and they brought the Man in Not Guilty : The Judge sent for the Gentleman, and desired to know his Reason for differing with the rest : And at last, upon Assurance that nothing should be done to him, Why, says he, would you have me find the Man Guilty, when I was the Man that killed the Person, and he was Innocent ?

Then, Sir, if you take the Evidence as it is ; I think, first, here is Capt. *Porter* : I do not find any Body Excepts to him ; and his Evidence hath been Approved of by several Juries, and several Persons executed upon it, and nothing Material hath been objected against it. I will not say, That Sir *John Fenwick* hath owned a great deal of this himself : He hath given every Body Satisfaction, how far he stands Guilty in his private Opinion ; but it is brought so far home, that there was Sir *John Fenwick's* own Letter to Convey him abroad. Here hath been Attempts upon other Persons ; you hear what have been done by the Solicitor. They say, he was not his Solicitor at that Time ; but, I believe, if it be enquired into, he was his Solicitor at that Time. Here are very pregnant Circumstances ; one Gentleman said, you ought not to make use of *Goodman's* Evidence here ; and yet he could make use of every thing to Disparage him ; for he could say, there were three Witnesses positive against him.

Now when 'tis so notorious what Parties there are for King *James* ; and we find Persons Plotting in every Part of the Kingdom : When you have an open Invasion before you, and when Designs are laid against the King's Life every day ; if this be not a Time to Exert an Extraordinary Power, I submit it to you.

Sir Rich. Temple. Sir, I shall not trouble you with any thing that hath been offered to day. That which calls me up is the Danger of the Precedent you are about

about to make, and the Arguments that have been used to Support it, which, I think, are more dangerous than that. I must confess 'tis a new Doctrine to me, That the Laws that are made by the Parliament, are to be no Rule and Guide to this House. Sir, the Birth-right we have, is in our Laws; and I did ever think till now, That the Laws were not only made for *Westminster-Hall*, but for all the Subjects of *England*; and especially, that they were to be a Rule to the Parliament that made them, till they should think fit to alter them.

Here have been great Mistakes between the Power of Parliament and the Jurisdiction of it; the Power of Parliament is to make any Law, but the Jurisdiction of Parliament is to Govern it self by the Law; and this, give me leave to say it to you, hath been the Opinion of all your Ancestors, and the Method they ever used: Shall we make a Law here in a particular Case against all the Laws of *England*? 'Tis *Ultimum remedium & pessimum*; you may use it in a Case of absolute Necessity, but otherwise it may be a Precedent to overturn all.

There are several things in making this Precedent, that overthrow all the Laws and Liberties of *England*. First, you are passing Judgment upon a Man upon one Witness; I have heard a strange Debate to Day, That there was but one Witness in Treason, before the Statute of *Edw. 6.* you know, that in Case of Treason, there was by the Common Law required two Witnesses; for if there was but one, the Party might demand Tryal by Battle, and that was the Common Law of *England*.

There is another thing that is Extraordinary; here you are going to pass an Act without any Tryal at all; for to say this is a Tryal before you the Commons, is a mistake; you never did Assume a Jurisdiction of Trying any Person, nor can you: You may for your own Information hear what can be offered, but 'tis not a Tryal where Witnesses are not upon

upon their Oaths. There is no manner of Power or Jurisdiction can be pretended for you to Try me; that is a second Thing. All the Bills of Attainder you have had, have been in three Cases, where the Persons have been either Dead or Fled, or have been without the Compass of the Law, and could not be brought to Answer: And you have had some Bills of Attainder after Tryals had in *Westminster-Hall*; but never a one of those have been called Tryals, but they have been generally Reversed; and for what? They tell you, That they have been Reversed by one Party, and another Party: It was in the same King's Reign, in *Rich. 2d's* Reign; they went forward and backward, as the Court-Party or the Country-Party were uppermost.

There is another thing in this, that I think, of a most dangerous Consequence; and that is, That you are making way, for what I know, by this Precedent, for a Rack, for so 'tis said, this is to force a Man to be an Evidence. Why, give me leave to say to you, 'tis a new way not known in *England*, that you will Hang a Man unless he will Confess or give Evidence; but I think 'tis something more than a Rack, for here is Hanging, Drawing, and Quartering in the Case; and I do not think this Proceeding will make him an Evidence with any Credit or Reputation to this House; nor am I of Opinion that he can Discover any thing worth such a Precedent.

Now give me leave to say one Thing as to the Jurisdiction of Parliament. It hath passed here for current, That the Parliament hath a Power to Declare what they will Treason, though so by no other Law; 'tis the greatest mistake in the World: I heard a great Debate upon this, upon my Lord *Clarendon's* Case, and 'tis plain, that Statute relates only to Cases brought from Inferiour Courts to Parliament; for it says, *That if any other Case supposed Treason, which is not in that Statute specified, doth happen before any Justices, the Justices shall tarry without going to Judgment of the Treason,*

till

till the Cause be shewed and declared before the King and his Parliament, Whether it ought to be Judged Treason, or other Felony; I speak to the Jurisdiction the Parliament has by that Statute. 'Tis, that if the like Treason (for at Common Law there was a great many Treasons) should fall out, and be brought before Inferiour Courts, of which they doubted, whether they were Treason or no, then they should be brought before the Parliament, to Judge whether they were Treason or Felony. But how shall they Judge? By the Laws in being. And who is this Judgment in? Not in the Parliament by Bill, but only in the House of Lords: Much less is it, That you may Judge that to be Treason in this House, that was not so by the Law before. So that give me leave to say, therefore there is no such Power reserved to the Parliament, to Declare any thing Treason that is not Treason before.

I must say, 'tis of the last Consequence, that we should make a Law in a particular Case to take away from him all the Liberty that belongs to a Subject. Some Gentlemen talk of the great Favour he hath had at this Bar; I know not what to think of it; I am sure you allowed the King's Counsel such Priviledges as I never see before, and that was to offer that for Evidence, that every body acknowledged was not so; and I do not think any body would think it a great Favour to be heard in this manner, especially to things not in the Bill.

'Tis said every Man must go according to his private Opinion, 'tis not said Judgment neither, the Instances that have been given, are of a quite different Nature: A Man is not to give his Judgment against his Knowledge; I think that Judge ought rather not to have Try'd the Cause at all; but if we sit here to Judge, we sit to Judge him according to the Law of England, and then we must Judge him according to Legal Proof: Will you set up a Judgment that is not only not tyed to the Rules of *Westminster-Hall*, but is

not

not tyed to the Laws of the Land, and Attaint a Man without a Legal Tryal, without Legal Evidence, and upon one Witness, when the Law says you shall have two; and after all, say 'tis a reasonable Proceeding? I know not how it came about, that the Act of Grace was passed, it did not rise from this House, if it hath had any ill Consequence, let them Answer for it that were the Cause of it.

They say the Government is at Stake, because the Plot hath not been found out to the bottom: That is not our fault, this Man hath been long enough in Custody; if he hath trifled with the Government, I am sorry he hath imposed upon them; but if it be so, I think there is nothing in this Case of that Consequence, as to make you make this Precedent.

Sir Will. Strickland. Mr. Speaker, I would not make use of any ill Precedents; and yet if the present Occasion, and the Necessity of the Kingdom required it, I would make a Precedent. I am glad that several ill Precedents are avoided in this Case, and I will be bold to say, whether this Gentleman suffers or no, no Man can say, that he hath been harangued to Death by Counsel.

Sir, I should be as tender in point of Blood as any Man; but I do think, if the Safety of the King and Kingdom is concerned, 'tis not one private Man that we must have that Respect for, as to let the Publick suffer by it: I do think, that upon this Occasion there have so Extraordinary things happened, as have hardly happened in former Ages: Here is one who is known to have been in a Conspiracy to bring over a *French* Power with a Popish Army, to destroy our Lives and Liberties, his Tryal has been deferred by his Equivocations and Pretences to make a great Discovery, which when he comes to make out, he Accuses the best of your Friends, and this is only an Artifice to get time till they could get the Evidence out of the way. I think, if you do not take notice of it, and let the Legislature supply that Defect, it may be of

ill Consequence, and may encourage any one to commit the worst of Mischiefs, upon hopes, that if they can get the Evidence out of the way, they shall go unpunished,

Sir Fr. Winnington. I shall trouble you but a little while, it being late. But Gentlemen saying 'tis an Extraordinary Case, I shall give my Reasons why this Bill ought not to be Committed; for every Member here now, is a Judge, and he must take the Blood of this Gentleman upon him in Judgment either to Condemn or Acquit him; and I must confess, I have very much admired, to hear that Doctrine preached, That every Man, as he is satisfied in his private Conscience, ought to Judge this Man Guilty. I desire to know by what Authority we sit here? We sit here and have a Legislative Authority, and 'tis by the King's Command we come together; but at this time we are Judicially Trying this Man for his Life, and therefore I humbly conceive, That we ought to proceed *Secundum allegata & probata*, and for any Man in his private Opinion, to say he is Guilty, he does not act by the Commission he sits here: For to tell you of the *Lancashire Plot*, or that a Man shall not be chosen hereafter, seems to be Arguments to inflame, but nothing to the Question.

Now, Sir, I will humbly offer to your Consideration, and the Judgment of the House, why I think we cannot Judicially Condemn this Man, for I think the Question of Commitment to be the same as of his Life and Death.

I do agree upon all the Precedents good and bad that have been cited, and doubt not but in Extraordinary Cases, 'tis in the Legislative Power of the Parliament to look after the safety of the whole; but I shall offer my Reasons why this does not come to that Case.

I will not now speak to the Rules of *Westminster-Hall*, but upon the right Reason of the Thing; for if it be Reason in *Westminster-Hall*, it may be so here, and

and that ought to overcome every thing : But whereas Gentlemen say you have one Witness; I do not apprehend you have one good Witness, and I will give you my Reason for it; for you must take Capt. Porter upon his Parol, and consider what he says upon his Word; and then I do appeal to every Gentleman here, Whether ever they did know that a Bill of Attainder proceeded against any Man upon bare Affirmation? No; in that Case you have turned it into an Impeachment, if the Thing looked probable, and then you had the Witness upon Oath, and the Ancient Method of Bills of Attainder use to be first by Impeachment of the Person, and then to turn it into a Bill of Attainder.

Then see what is it that is insisted on by the King's Counsel, and recited in the Bill, *That there was a Bill of Indictment found by the Oaths of two Witnesses*, that is, Porter and Goodman: Under favour, I think they are not to be counted as Witnesses in the point; and I offer this as a Reason; I think, 'tis Natural Justice in all Courts of the World, That if a Man be Accused as a Malefactor, he should have the liberty to Cross-examine the Person that accuses him. Now we very well know, that in Case of Bills of Indictment, when they are found by the Grand-Jury, they never admit the Prisoner to put Cross Questions, because the Bill of Indictment is but the Accusation, and if an Accusation be enough, who can be Innocent? Why, then if it be so, then this Oath that was given to the Grand-Jury, is not such an Oath upon which you can put such a value.

Then, Sir, go to the Paper of Goodman, which you would Read, and consider the validity of that. Goodman upon his Examination, was Sworn before a Justice of Peace: Under favour, Goodman being now absent, the Prisoner hath no Opportunity to Cross examine him; and I beseech the House to consider the ill Consequences of it; any Minister of State may come and get an Examination before a Justice of Peace, or

Secretary of State, and the Man is conveyed away, and a Bill of Attainder is clapped upon his back, and this shall be Read as Evidence against him. He is but half a Witness, and a Witness upon an Accusation, not upon a Tryal.

Then come to Sir *John Fenwick's* particular Case. Sir *John Fenwick* is Indicted, Issue is joyned, and he hath notice of his Tryal, and one of the Witnesses goes away, no Man can tell upon what account he went; I may believe why, in my private Opinion, but that is not Judicial Knowledge: Then if that be so, was it ever known, that when any Man was Indicted, and Issue joyned, because his Tryal was deferred, therefore a Bill of Attainder must be brought against him? here are Plots against the Government, and it may be Forty may be taken up for it; and as to Twenty, there may be two Witnesses, and the others may have the good luck to have but a single Witness against them, will you have Acts of Attainder against all the rest? If this had been an Extraordinary Case, wherein the Government had been principally concerned, it might have weighed with you; for no Man can shew me any Precedent of a Bill of Attainder, but where there were open Acts of Hostility, or Men of great Relation and Power were concerned to Subvert the Government: But what is Sir *John Fenwick's* Case? He is in Custody, and the Plot is Detected; if he was run away, you might still suppose he was Plotting against the Government, because he was fled from Justice. Gentlemen say the Government is concerned, so it is in every Felony and particular Treason, but must there therefore be a Bill of Attainder to punish it? When there is a Bill of Attainder, it must be from an immediate Danger that threatens the Government Established, that such a Man is Attainted: But I do not see that Sir *John Fenwick* hath any of these Circumstances. All Men agree, That this is an Extraordinary way of Proceeding: Then the Question is, Whether Sir *John Fenwick's*
 Case

Case be Extraordinary? Or whether he be more than a Common Malefactor that is in a wicked Conspiracy? I do not see that this Case of Sir *John Fenwick's* is so Extraordinary, that if he be not Hanged, the Government must fail.

And, under Favour, a Precedent when 'tis once made, I know not what Time may produce from it: It may be after the Death of His Majesty, that came to restore our Liberties, we may have wicked Members, and Members chosen as in *H. 6.* Time. It may be the Condition of every Subject of *England.* The Power of Parliament we must govern by Reason and Common Justice; and if there be not urgent Necessity to use this Extraordinary Remedy, because it may be dangerous to Posterity, I am against this Bill.

Sir Tho. Littleton. The worthy Gentleman took Notice, That the *Lancashire* Plot, and some Words I used, were used only to inflame: I can't so well guess at his Thoughts, but I have heard him several times bring his Wife and Children into his Speeches, to no purpose at all.

Sir Francis Winnington. I have a Wife and Children, and that Gentleman none; therefore I think I may make use of that Expression.

Sir Edward Seymour. Mr. Speaker, I have attended your Debate with the best Attention I can; and I have heard a great many Arguments, and some very Wild ones too. I hope, how frightful soever Things have been opened, they will not lead your Understanding out of the Methods and Rules of Justice: I will not take upon me to tell you, what is nothing to the Question; as that Treason is a very great Crime, or that the Parliament hath an unbounded or unlimited Power, and are not tied to the Rules of *Westminster-Hall*; I think that is no part of the Subject-Matter before you.

That nothing bounds or can limit the Parliament, is what every body does admit; but 'tis the right

Application of that Power which is now to be considered of: For you may Judge the Prisoner, and others will Judge you. The World will Judge you, if you do not apply that Power aright.

For my part, I shall avoid, as much as can be, the saying of any Thing that hath been said; and therefore I hope you will believe that my Discourse must be very short: But that which does move me in this Question, is in short this, That I do not give my Judgment to Condemn any Man otherwise than the Law directs how, and upon what Terms, I must give it; if the Law hath said, that Treason is not to be Treason, unless it be proved by two Witnesses, I am never to give my Judgment in that Case when there appears but one.

And this I take to be the state of the Case, not to enter into Matters of Precedent of Attainders, for those are only Instances of so many Facts that have been done. And in all those Instances that have been urged and quoted, when Times have been sedate and quiet, marks have been put upon them, (as was hinted by a Gentleman that spake very ingenuously upon this Subject at the beginning of this Debate, I say, marks have been put upon them) for you to avoid, but not to imitate. I take it, that the Law hath determined that there shall be two Witnesses to the Proof of Treason, and there is no Treason that hath not two Witnesses to it. There is but one Attainder that we meet withal in Sacred History, and that is the Attainder of *Nabob*; he was Attainted, and we know what induced that Attainder; he had nothing to Object as to the Formality of the Proceedings against him: And though *Jezabel's* Letter had deposed the Rulers to deal by him as they did, yet there were two Witnesses that did appear against him.

I take it, that two Witnesses are requisite for the Knowledge of the Truth, that you may make a right Judgment whether they swear right or no. I will give you but one small Instance more; I must tell you

you *Susannah* had been but in a bad Condition, if one Witness and Circumstantial Evidence, would have made her Guilty.

A Gentleman here says, 'tis *Apocrypha*: But that which weighs with me, is, that there may be Inconveniences on one side, and there are no Inconveniences on the other. I know not what may be the Consequence of this Precedent, nor where it may bring you: I know the Consequence if Sir *John Fenwick* be not Executed upon a Bill of Attainder; for no Body will believe there is a Necessity for this Extraordinary Remedy to be applied for an Offence a Year and half after 'twas committed, and when he hath been Indicted and Arraigned for it, and they might have proceeded to his Tryal, and I know not whether 'tis his fault that they did not, for it was not in his Power to prevent it: And if you, upon every Occasion, come to supply the Defects of them that are remiss in the Government, it will make them more so.

As to the Matter of Precedents, Why, it may fall out that by this Precedent an Innocent Man may be punished, and then we that make this Precedent, are Guilty of his Blood; and if he suffer never so remotely, it will be required of us, if it proceed from this Precedent. Now, if Sir *John Fenwick* be not Executed, unless in a Legal way, What is the Consequence of that? Is it that Sir *John Fenwick* shall go unpunished? Though they are deprived of one Evidence that would make it Treason, he may be punished for a Misdemeanor, and Imprisoned for his Life; and I had much rather he did languish in that Condition, and I am sure it is much safer for you, for no Inconveniency can arise that way; and I take it, that when those that are our Guides dispute which is the way, we are to take that which is the safest.

The Learned have disputed, Whether this Matter, as now it is charged upon Sir *John Fenwick*, be Treason? I will not take upon me to determine it, they

differ about it : and when they can't determine it, will you by a Question determine it absolutely ?

Upon the whole, there hath been so much said by the Counsel for the Prisoner, and so little said by the Counsel against him, and so few Arguments urged against him, that I must still retain the Opinion I had, That there is not Evidence enough for you to proceed upon this Bill of Attainder.

Mr. Boscawen. Sir, I desire to give my Reasons for my Opinion in this Matter. I have no Personal Disgust against Sir *John Fenwick*. The great Argument against this Bill is, That this is an Extraordinary Proceeding, and therefore should be against an Extraordinary Person ; and in the next place, that it is against the Rules of Law. The Rule of the Law is, That there must be two living Witnesses ; and Gentlemen generally agree, That 'tis within the Law of Parliament to Attain Persons by Bill of Attainder ; but they say this Power hath been often misapplied, which I do easily believe, because some have been attainted, and have not been heard ; and some have been in Tumultuous Times ; but this Gentleman hath had a fair Tryal, and a Debate in this House. But I would fain know, though they confess Bills of Attainder may be, how it can possibly be, if the Lawyers at the Bar say true, That it must be upon Oath, and you give no Oath.

Some say, it may begin in the House of Lords ; under favour, I take it, That a Bill against a Commoner can't begin in the House of Lords. And if you can't have Witnesses upon Oath, you must have as much Evidence as the Nature of the Thing will afford ; that is, you must have Witnesses to convince your Consciences in the Thing ; for if all this great Assembly are satisfied in their Consciences, that he is Guilty of inviting an Army of *French* to come into *England*, I am astonished to think that you should not pass this Bill against him : I think, as to this Witness, *Porter*, they have not endeavoured to blemish him, but their

it, their Argument seems to run more upon Goodman's
 not being present. I would know if there are two
 by Witnesses, and I do not believe them in my Con-
 the science, whether I can pass this Bill? But I appeal
 a- in this Case, *res ipsa loquitur*, the Thing is so plain.
 ad, How many have been Attainted and suffered for the
 ro- same Crime, that have acknowledged Sir *John Fen-*
 for *wick* to have been present. There were several Mem-
 if- bers of the House sent to Examine Sir *John Friend*,
 nt and Sir *William Perkins*, in *Newgate*; and they were
 o- sent with this Intimation, That the House would In-
 r- terceed with the King for a Pardon for them, if they
 ft discovered the full of the Plot; (it was not the Death
 at of Sir *William Perkins* and Sir *John Friend* that was
 en aimed at, but the Preservation of the Publick) and
 a- when they were examined, they did acknowledge,
 ut that they were privy to the calling in of the *French*,
 , and that Sir *William Perkins* was to have a Troop of
 n Horse, there was to be 2000 Horse, but he would not
 e redeem his own Life with the Blood of others. Now
 h I do take it, that there is Evidence against Sir *John*
 I *Fenwick* sufficient in a Parliamentary way to Attaint
 - him. The Gentleman says, the Consequence of
 - throwing out this Bill, would be nothing, and that
 , Sir *John Fenwick* is a little Man; I agree he is, but
 ; 'tis the Consequence of bringing in a *French* Army
 that is to be considered: Would you Pave the Way
 for them to come over, and make their Entrance easie?
 I hope the People of *England* are concerned in the
 Case, as well as their Wives and Children; if you
 let him go, what will be said? I have not heard one
 say, that he believes he is not Guilty; there is none
 but think him Guilty, and yet will you let him escape?
 What Encouragement will this be to your Enemies?
 He hath not denied the Matter himself. Nay, he
 hath not brought one Gentleman to Vindicate him,
 that he is a Man of Behaviour, not to be believed to
 be Guilty of such a Thing, which was done in other
 Tryals.

I desire

I desire you would consider what the *French King* said of his Brother King *James*. How could he think to bring in Popery with a Protestant Army? I assure the bringing in of a *French Army* must be for the Destruction of the People of *England*, and the Protestant Religion, and will bring your People to go in Wooden Shooes; 'tis the Example of this thing you are to consider. It was said at the Destruction of *Carthage*, That the Commonwealth was always to be minded: I think you ought always to be mindful for the Preservation of *England*; and I believe he is Guilty, and I am therefore for the Bill.

Ld. Digby. I shall trouble you but with a Word or two. I suppose as long as we Act by the known Rules of Justice, and the Laws of our Land, we shall not need to fear any Censure in our own Kingdom, or any where else; but 'tis a very uncertain thing for Gentlemen to be Judges in the Case of Life and Death, without any Rule to walk by; a great many will not allow us any Rule at all: I always took our Rule to be the Law of the Land, and that even our selves are bound by the Laws our Ancestors have made, till we think fit to Repeal them; and I am confirmed in this Case by one particular Argument from the Bill of Treason that passed last Sessions; in which there is a Clause, That it should not extend to future Parliaments. The only Arguments for exercising of this Power, is the Extraordinary Case of this Gentleman. When a Gentleman speaks of the Power of Parliament, I take it to be the just Power of Parliament; I think a Man may say, a Parliament can't do what they can't justly do. But all Gentlemen allow that this Power ought not to be exercised but in an Extraordinary Case, wherein the Government is nearly concerned: I believe very few but think if it had not been for the Vindication of some particular Gentlemen, we never had had this Matter before us; and then I will leave it to Gentlemen to consider,

consider, if the Government can be in so much danger if Sir *John Fenwick* does escape.

Mr. Brotherton. Mr. *Speaker*, I perceive the Question whether this Bill shall be Committed, arises very much upon a Supposition that seems to be granted, That there is no other Law to Try this Person by; and it hath been hinted, That before the Statute of *Edw. 6.* one Witness was sufficient: Now, if I shew you that there is a Law in being, and hath continued for several Hundred Years, whereby a Man may be Tryed, and that by one Witness, I think it is something that hath not been spoke to yet.

Sir, I ground my Reason and Opinion upon the Authority of the Law, and upon the Historians of all Times who agree in the thing, and come down to my Lord *Coke*, which is Printed by Authority; and he is express, That where there is but one Witness he Treats of what Witnesses are necessary, and he tells you two Witnesses were required by the Common Law for Treason, if the Person was Tryed by a Jury; but, says he, if there be but one Witness in Case of Treason, he shall be Tryed before the *Constable and Marshal*. And in Treating of the Statute of *H. 8.* which does appoint how Treason beyond Sea shall be Tryed; says he, that is only where there are only two Witnesses; but if there is but one Witness, he shall be Tryed before the *Constable and Marshal*, because, says he, the Statute of *H. 8.* does not take away that Tryal before the *Constable and Marshal*; and for that, Sir, there are several Precedents in this Case, of Persons that have been Attainted by a Court-Marshall: And if the Accuser was vanquished, he was to suffer the same Judgment the Defendant was, if he was found Guilty. I am upon a Gentleman's Life, and never was so before, and desire to be never so again; there have been several Precedents, I say, in this Case, and my Lord *Coke* is express in the point; and I desire any Gentleman to shew me any Law that hath Repealed this.

In

In case of Murther; suppose a Man be wounded upon the Land and die upon the Sea, and I could shew several Cases where the Common Law can Try a Man by Jury, but he shall be Tryed before the *Lord Constable* and *Earl Marshal*. Before the Statute of *Ed. 6.* If a Man was wounded in one Country and died in another, he could not be Tryed by Indictment. That which I aim at, is to shew you, that though the Common Law should fail, yet they need not come with a Bill in this Case: If two *Englishmen* beyond Sea fight, and one kill the other, it can't be Tryed by the Common Law: How then shall it be Tryed? It must be Tryed by the Court-Marshal. And in the Case of High-Treason, where there is but one Witness, the Party may be Arrested or Appealed before the *Lord Constable* and *Earl Marshal*, and it shall be Tryed by Combate: Of this way of Tryal there are several Precedents, as *Sir John Annesley* who Appealed *Ralph Katrington* of Treason, 2 *Rich. 2.* And a certain Knight of *Navarre*, who Appealed *John Welch* of High Treason, 8 *Rich. 2.* and the Knight was vanquished. And 1 *H. 4.* between the *Lord Morley* and the *Earl of Sarum*. 8 *H. 6.* Between *John Upton* and *John Down*, who fought in *Smithfield*. 2 *H. 6.* *John Lord Talbot*, Lieutenant of *Ireland*, Arrested the *Earl of Ormond* of High Treason before the *Earl of Bedford*, Constable of *England*. And in the time of King *Charles the First*, in the Year 1631. *Donold Lord Rey* Arrested *Ramsay* of High Treason before the *Earl of Lindsey*, made *Lord Constable* for that time. So that *Sir John Fenwick* may be Tryed as others have been, without an Act of Parliament.

Memo. *Mr. Paget*. Sir, I attended to the Debate of this
randum, Day, and have not hitherto troubled you my self,
Mr. Bro- because I did expect to be better informed by this
therton Debate.
was here

Interrupted

by the great Noise the House made upon the Novelty of the Argument, and did not go on farther with it.

I think

I think the Substance of the Debate of this Day, hath been not so much to shew us by what Rule we are to go, as to shew us that we have no Rule to go by but our own Judgments. Sir, I never had the Honour to sit in Parliament before this time, and therefore can't Quote Precedents of what hath been done in former Parliaments; others have taken a great deal of Pains to shew you, that it is in the Discretion of Gentlemen, and they are only to be satisfied in their Consciences; I am not fond to hear my self speak, and therefore I hope I shall be favourably heard at this time; and I do think I have the more Reason to speak at this time, from something that fell from a very Honourable Gentlemen at the Bar: If I do misrepeat him, I hope he will excuse me, for I do not do it with an ill design; but I think his Words were to this effect, That he did not know, but if it was known in the Country, that Gentlemen did give their Judgment against passing of this Bill, it might hinder their Election in future Parliaments. Sir, since there seems to be so great stress upon our Determination in this Matter, I hope I may at this time shew you my Reasons why I can't come up to agree in this Bill; and I shall submit it to them, whether they will do me the Honour to chuse me again. I must confess, I do think this is as nice a Case as I can pretend to give my Opinion in; and as it is so, I shall desire the best assurance of the Truth of this Matter, before I give my Opinion for the passing of this Bill.

Sir, you have had before you one Evidence, I will admit him to be as much as a single Evidence can be. As to the Paper of *Goodman's* Examination, I have heard that, and other Matters too, which I shall not repeat: But I do remember, that in the Debate of Yesterday, it was not insisted on to be another Evidence; and if not so, I shall only take the Matter as depending before you upon one Evidence only.

Sir,

Sir, it is true, I believe this House, as to its Legislative Proceeding, is not tyed by the Methods of Inferiour Courts: But I hope I shall be excused, in the Methods of Prosecution and Conviction of Offenders, after they have been prescribed by the Wisdom of the Parliament, I believe this House can't take away any Persons Life upon less Evidence than Inferiour Courts could do.

And Sir, I shall not enter into any very long Vindication of my self, and my Zeal and Willingness to serve this Government, I never was employed in any other Government, and I think my Actions have been such, that no body can instance in any one Thing that hath looked otherwise and when I have said this, I shall trouble you no further about that: But there hath been so much stress laid upon this Bill, that whosoever speaks against it, seems to speak against the Government; but because it is said, the passing of it is so necessary for the Support of the Government. And I was the more willing to offer you my Reasons, because, as the Nature of this Debate has been, I can't satisfy my self where my Judgment and Opinion shall rest: For if it be so, that you are not tyed to have as much Evidence as Inferiour Courts, and, as they say, one Evidence is enough, and my Judgment may be guided by Papers, then they, without any Evidence, may be enough to satisfy: And if you take up with less Evidence than Inferiour Courts, I don't know how little Evidence may take away a Man's Life.

As to the Prisoner, I know him not; but I think this Bill is for all that he hath to lose, and is for all the best *Englishman* can lose upon the like Occasion.

Sir, I shall be very tender in giving my Opinion for the Bill, unless it was very clear to me that it was Reasonable. Truly I have heard very little of the whole Plot, or of this Matter that hath been Examined, or for which others have been Executed; my Life has been generally in the Country, and I have

not

not had the Curiosity to buy the Tryals; and as this is the first Person that hath been brought before me, to give my Judgment on, I hope I may be excused for taking this Liberty, upon such Evidence as appears before us, to tell you, I can't give my Consent to this Bill.

Sir Will. Lowther. Sir, you have had a very long Debate in this House, and long Discourse from the Bar; and though the Counsel was directed that they should not Dispute the Privileges and Authority of this House, yet, as far as my Judgment carries me, their whole Discourse was against it: And most of the Gentlemen that have spoke against the Bill, it hath been because it hath not been adequate to the Proceedings of the Courts in *Westminster-Hall*, because there hath been but one Witness. Sir, if there had been two Witnesses, this House had not been troubled with it: It is a Case of a very extraordinary Nature, and so required an extraordinary Proceeding.

It hath been questioned by some Gentlemen, Whether one Witness be sufficient in this Case, or no? Which I wonder at, since a great many have been Convicted upon his Evidence, and every one of them has confessed, which shews it to be a notorious Truth.

There is another Inference they draw from the Proceedings here, because a great many of those Precedents of Attainders have been reversed, and those with Notes of Ignominy. If they did consider the Times they were made in, and the Times they were reversed in, there might be a great deal of Cause for it: We find that it was contrary Factions that reversed them, and that makes it never the worse. And truly, Sir, I do not know but where Circumstances are so notorious, they are *tantamount* to a second Evidence, as I have heard in *Westminster-Hall*, and in Cases of Life too. If a Man be murdered, and two in a Room, and one comes out with a bloody Sword, the Law does presume that Man murdered him, though there

there is no particular Evidence that he murdered him but only this Circumstance ; and yet the Man's Life is concerned in that Case. So that upon the whole it appears to me that he is Guilty, and, I think, nothing can be plainer.

There is another Circumstance, That he Fled for it ; and that is a Presumption of a Man's Guilt : For a Man loses his Goods if he flies for Felony.

Mr. Harley. It would be very unreasonable and impertinent to trouble you long after such a Debate ; I shall avoid Repetition of what hath been suggested to you, much better from other Persons than would have been from me.

I own 'tis a Case of great Concern, and 'tis my Misfortune that I should ever sit upon a Thing of this Nature ; but I will discharge my Conscience always, and give what Arguments occur to me, why I am against this Bill.

Gentlemen have been pleased in their Arguments to enter upon the Debate of your Power and Authority, and have made that a part of their Argument ; but I think with Submission, we need not Dispute that at all. It is admitted, that there have been Bills of Attainder passed formerly, and your Authority is not under Dispute ; for the Legislative in all Nations have a Power lodged in them, for the Safety of the Whole.

But your proper Enquiry is, Whether this is such a Case as you ought to exercise this Extraordinary Power ; *Omne regnum sub graviore regno* : Though you have this absolute Authority, yet 'tis to be executed by the Rules of Reason, and by the Rules (for such there are) of Eternal Justice ; and I look upon this as one that is inviolable, That no Man can forfeit his Life, in such a Case as this is, without two Witnesses. I must adhere to that ; because I have heard nothing in this Debate that can make me quit that Maxim : And 'tis such an Ancient Land-mark, that I will never draw a Curse upon me and my Posterity, for removing

removing of it. I beg Pardon that I speak with this Earnestness to you.

Gentlemen have been pleased to make it part of their Arguments, The great Danger the Government is in, if this Bill does not succeed. I will not use many Words, but I think that Argument ought not to be taken in the Gross. Let it be examined, Whether this Argument, of the Hazard of the Government, is of equal Poize for you to break the Eternal Rules of Justice. I won't quote the Case at large, every Gentleman knows it, (though there were two Witnesses in that Case to put an Innocent Person to Death) where it was urged, *The Romans will come and take our State and Nation.* But with how much Reason that was urged, every Body knows; and how far the Government is now in Danger, let us consider. Is this Gentleman out of your Power? Is the Government in Danger of a Man that is your Prisoner? Is he in open Rebellion against you? If this Law does not pass, if you have not your Hands in his Blood, is he not under the Power of the Law? Did not he tell you so himself?

Every Gentleman ought to have a Zeal for the Government, and I wish it was as visible in every Thing else; but if that be so, give us leave also to speak with Zeal for our Liberty, and Ancient Constitution. The Argument is turned two ways; on one side you are told, That this probably may make him Confess something; and by others, He is to be made an Example of Punishment. This is the first Bill of this Nature; but the same Reason that leads you to this, must lead you to all the rest: The same Reason that is urged for this Bill to make him Confess, will lead you to bring in a Bill to make him a good Evidence. This every Body must allow to be the Consequence of it.

How does this Bill come before you? It comes before you upon a Villainous, Scandalous Aspersions of some great Men. Though I know them not all, yet I

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have

have a great Value for them, and I would make their Case my own : But if they were the nearest Relations I had, I would be against this Bill even upon their Account ; and let any one Examine the Reason of it.

Sir, I won't run into Precedents ; but only because it hath been told you, That the Precedents were made in one Reign by one Faction, and then the Attainders were reversed in another Reign by another Faction, there is one occurs to my mind, which hath been touched at, and is at least of particular Instruction to me : There was a Case in *Ed. 3d's* Time ; A King had been Deposed, and barbarously murdered : There was no disputed Title, but his Son upon the Throne ; the notority of Fact, and its hainousness stirred up many Heats, which brought in an Attainder, and particularly of a very great Peer : But four Years after, a Bill was brought in against the Earl of *March* ; and one of the Articles against him was, That he had procured the Attainder of that Noble Lord, under Pretence of some Letter or Paper, that was signed by him ; which, if it was so, says the Record, was no Evidence,

I lay this before Gentlemen, to shew them how Things have turned, and Precedents that have been made very unanimously, but in bad Times have been turned to shed the best Blood in *England*. It grieves me to my Soul to hear of Mr. *Cornish*, whose Attainder you have reversed, to hear that quoted as a Precedent in this House : 'Tis not whether two Witnesses be the Rule of *Westminster-Hall*, 'tis the Rule of right Reason ; and 'tis a Maxim in your Law, Make what Law you will against the Law of God, 'tis void : And this is the Law of God, and right Reason.

You must provide for the Government, and Armies must do it, when the Courts are shut, and Laws are silent, but 'tis hard to pervert the Methods of Common Justice without any necessity. I hope Gentlemen will

not

not put a hard Construction upon what I have said, I have done it to discharge a good Conscience.

Mr. Chan. of Excheq. Sir, I am for the Commitment of this Bill, because in my Conscience I think Sir *John Fenwick* is Guilty ; and because I think the Power of Parliaments may interpose in this Matter : And if they have such a Power, I think they may justly exercise it in this Case.

Gentlemen say, they will not Dispute the Power of Parliament ; and yet in their Arguments they tell us, we are not to proceed otherwise than according to the Forms of Inferiour Courts. And if the Parliament is not to proceed without two Witnesses in the Case of Treason, give me leave to say, there is no manner of room left for a Bill of Attainder, unless you will take the Business of Inferiour Courts upon your selves : And I am confident several Gentlemen, if there were two Witnesses, would use it as an Argument, What have you to do with it, refer it to the ordinary Courts of Justice ; And I am sure that would be very reasonable. But I do think that Parliaments have this Power, and they have always used it ; and I believe 'tis for the Advantage of your Constitution. The Inferiour Courts are to go by the Letter of the Law, and whoever can avoid that, is to escape Punishment there ; but the Legislative is not to be dallied with : And if the Offence be of that Nature, that Inferiour Courts can't reach it, they can go beyond all Forms to preserve the Government. This they have done, and upon that Principle you sit here. Was it by the Forms of Common Justice below, that you declared the Throne to be Vacant, and King *William* to be Lawful King ? Is it upon the ordinary Rules of *Westminster-Hall* that his Title does depend ? No ; it depends upon this Maxim, That the Parliament of *England* are entrusted for the Whole, and may Constitute a Government for the Preservation of the Whole. And upon the same right Principle that I gave my Vote to declare him Rightful and Lawful King, by the same Principle I declare his Enemies to be Traytors.

You are told here, 'tis according to the Law of God and Nature, that there must be two Witnesses in Cases of Treason : I do not pretend much Skill in other Parts of the World, I think 'tis our particular Happiness to have this way of Tryal ; I think in any other Part of the World, if he had dealt thus with the Government, he would have had another manner of Proceeding against him, than to be Condemned by King, Lords, and Commons : But that is your Constitution, but it does not hold in other Parts of the World.

Some Gentlemen lay the stress of their Argument upon the ill Consequence it may have in another Reign ; I would avoid ill Consequences in another Reign as much as I could, but our immediate Care is the preserving of the present Constitution.

But if Gentlemen are apprehensive, that by such an Example, if King *James* should return, others may be punished ; if we may Judge what he would do, by what he hath done, he would go another way to work : If he came to *London*, he would proceed as his Party did at *Dublin*, and Attaint all the Protestants in one Common Bill ; that is the Precedent he hath set, and he will follow. And therefore in Order to prevent that, and in Order to punish our Enemies, and to preserve the Constitution and Prerogative of Parliament in all Points ; and because I am convinced in my Conscience he is Guilty, I shall give my Concurrence for Commitment of this Bill.

Col. Granville. Sir, I would not presume to trouble you at this time of Night, was the Debate upon a less Subject than it is ; but since you are going to pronounce Judgment in a Case of Life and Death, and we are told this House is above any Rule, and that we have no Precedent comes up to the Case in question, but that every Gentleman is to find out private Rules to walk by, I think it my Duty to declare by what Rule I shall govern my self in this Matter ; which is this, I will deal with Sir *John Fenwick* to Night,

Night, as I would have Mankind deal with me, if I was in Sir *John Fenwick's* Place. Now, if I was Indicted of Treason, and not allowed any Tryal, nor the Benefit of making my Defence according to the known Laws of the Land, I should think my Blood unjustly spilt, let me be never so guilty.

The Laws are set up for the Defence of every Man, and when once we break through them, whatever our End may be at that time, and though it may in some manner seem justifiable, when it is to come at the Punishment of an Ill Man; yet pray consider, the best of Men may as easily be reached by this Extraordinary manner of Proceeding, as the worst of Men. And what makes me very cautious, is, that my Hands are guiltless of Blood yet, and I will take care how I begin to dip them in it. And that which will always make me cautious in any Case of this Nature, is, when I read in the History of the late Times, that when once a Set of People had begun to dip their Hands in the Blood of my Lord *Strafford*, nothing would quiet them till they had stained their Hands with the Royal Blood. The Laws are set up as a Common Fence between the King and People; and the King (as well as People) is always safest when the Laws are most strictly observed.

I shall not pretend to talk of your Power, which certainly hath no other Bounds but your Justice and Discretion; but I hope you will never exert the Extraordinary Power that is lodged in you, but in such Cases as will meet with Approbation abroad. Sir, I hear our Proceedings upon this Bill of Attainder called a Tryal, but I cannot think it any; and, with Submission, I do think we are a very unfit Court to determine this Matter. We sit in so many Capacities, 'tis hard to distinguish in what Capacity we Act: Some of us are Witnesses, some are Prosecutors, some others are accused; 'tis hard to be accused, and to be a Judge at the same time. I am sure I am as much concerned as if I was accused my self, being so

nearly related to one that is ; and it is for his Innocence and Honour that I think my self bound to oppose the passing this Bill. For as no Resentment shall make me do any thing that is unjust, so I fear nothing that he can say, and I scorn to stop his Evidence, by cramning a Bill of Attainder down his Throat.

Besides, it is an unfit thing for any Gentleman, who is obliged to be of Counsel for the King, to sit here as a Judge : I think also, to proceed in this manner, is a disrespectful Thing to the King himself ; for in this Case you turn the Throne of Mercy into the Seat of Judgment. The King, who should have all the ways to ingratiate himself with his Subjects, you make him, by this Proceeding, to pronounce the Sentence himself upon the Life of a Subject. It is hard therefore to offer a Bill to the King in such a manner, by which you oblige him either to reject it, (which was always looked upon as a Hardship when done) or to pass Sentence upon this Gentleman, which perhaps his Gracious Temper and Mercy makes him averse to.

Sir, it is too late to give you other Arguments, and you have heard from other Gentlemen a great many better than I can give ; but I think this Bill is Unjust in its Rise, evil in the Progress of it, and dangerous in its Consequence, and therefore I hope you will not Commit it.

Sir H. Crofts. Sir, I did not think to trouble you in this Debate, but only for the Arguments that have been used by some that spake lately, who seem to lay a great Load upon Men, according as they give their Vote in this Matter, because 'tis in relation to the Blood of a Man. I have considered the Point, I hope, with as much Caution as any Man within these Walls, and hope to act with as strict a Conscience as any Man whatsoever ; and shall be very glad to be informed from those Gentlemen, that have laid the stress so hard upon Religion, how they can shew me,

me, that I do not as strictly, as to all Points of Religion, give my Vote for passing of this Bill, as they would Excuse themselves from it. I must agree with those Gentlemen, that you are in no wise bound, or limited, to the Rules of *Westminster Hall*; and therefore what was said upon that, I did not think worth taking notice of: But when we are told, We are bound up by the Laws of Nature and Religion, and the Law of God in this Matter, that touches me so nearly, that I must desire those Gentlemen to shew me in Scripture the Law that they quote.

If it be the Law of Nature, and the Law of God, that every Man that dies must be Convicted by two Witnesses, as an Honourable Person observed, I wonder it is not observed by all Christian Nations and Governments, that they are not all governed by this Law; if there be any Direction from the Law of God, that no Man is to die for Treason without two Witnesses, but he may suffer for Murther and Felony with one Witness. Now, I say, I must desire the Gentleman that asserts it, that he would please to shew me it in Scripture, and I will be entirely of his Opinion: But till I hear that very plainly proved, 'tis not within my Reading nor Remembrance; and therefore I desire it may have no weight. And now I am up, I shall give you my Reasons why I shall give my Vote for this Bill.

The Reason that Governs me, is the Preservation of the Government, and the Commonwealth under which I live; and which I think, I am, in the Station wherein I stand, bound to preserve, by all the Rules of Justice imaginable. Now, if your Law hath bounded Inferiour Courts, but have not bounded you in this Matter, though you have said Inferiour Courts shall not determine and give Judgment in such a Case, yet I think, you are not bound up so here: But if the Matter be proved to my Satisfaction, I may give my Judgment according to the Evidence that comes before me without that Restriction.

But, Sir, this ought not to be done, 'tis said, but upon Extraordinary Occasions. You were told, some Time since, of the Case of the Duke of *Monmouth*; but it was said, That he was Attainted because he was in Arms, and could not be come at otherwise: But I think this is a parallel Case to that, if not much stronger; for here is a Person that hath been Accused, and fully Proved to have been in Rebellion, and in Treasonable Practices with your Enemies, to bring an Invasion upon you, and to subvert your Government; and though he hath not been proved to have been in that single Act of the Assassination, yet there is such a Correspondence between one and the other, that I do look upon him as equally Guilty of both. Therefore this having been so fully proved, and the Person that stands accused being out of the reach of the common Course of the Law; What Remedy have you, but to fly to your Legislative Power, to Attaint him upon the Grounds and Allegations in your Bill? That one Witness is withdrawn, I am very well satisfied, and I think we may presume 'tis by his own, or his Friends Encouragement or Procurement. And I do take this to be as reasonable a Ground for your Bill, as any Thing in the other Case: And I know not what is an Extraordinary Case, if this be not one. Is it not an Extraordinary Case, for a Plot to be laid for the total Subversion of this Constitution, and our Religion for ever, and we can't come at it to punish it another way? But it hath been said, the Safety of the Government does not depend upon him: If we acquit him, we are to acquit every one alike: I hope the Government does not depend upon him alone; but if you clear him, there is the same Right to clear any Criminal whatsoever, and we may be answerable for any future Mischiefs that happens to this Government. Sir, since I am brought upon giving my Judgment in this Matter, (though I come as unwillingly as any body to it) I must go according to my Conscience; and till I can see somewhat of the Law of God, that

has

has been hinted at, made out, I must go according to the Law of my Reason; and that is, that I must be for this Bill.

Ld. Norreys. I will not pretend to tell you what the Authority of this House is, 'tis what they please to make it: But I am sure they will ground it upon good Reason; but I think the Reason chiefly given for the Commitment of this Bill, leaves you a Latitude to do what you please, and give no Reason at all; for it is only to say, I am convinced in my Conscience this Man is Guilty; no matter upon what Proof, no matter whether any Proof or not, you may believe it from his Life and Conversation, and the Company he keeps, or from his Interest, and that may be Argument enough to find a Man Guilty. But till I know a Reason better grounded than this, I cannot be for the Commitment of this Bill.

Sir Christ. Musgrave. I am sure at this time of Night I am unfit to speak in so great a Matter; I must confess I should not have troubled you, if it had not been in the Case of Blood.

You have had a great Debate before you of the Power of Parliaments, and that hath been sufficiently argued; and I have not Learning enough to give you any Precedents that have not been already quored: But every body does agree in this, That what Power you have of this kind, is not to be exercised but upon Extraordinary Occasions. Now, I would be glad to know, What this Extraordinary Occasion is?

Every body allows, That Treason is the greatest Crime a Man can be Guilty of; and the Charge of this Gentleman is High-Treason: But therefore, in this Case, must you exercise this Authority? Pray wherein does this Case differ from any other Case of High Treason, that any other Person may be Practising against the Government? All the Difference I can make of it, consists in two Points; the one is, That he hath Prevaricated with the Government; and the other, That Gentleman say he hath been a Means of

Procrasti-

Procrastinating his Tryal, in which Time an Evidence had made his Escape. Sir, I will allow you, that 'tis a very great Crime for any one to asperse so Great Men as he hath done; but I would be glad to know, whether there being such an Ingredient, it be sufficient to Attain him of High Treason upon that Account.

Then as to that of a Witness being gone, Gentlemen have said, They are apt to believe, and there is great Presumption that he hath been the Occasion of this Goodman's being gone. Is that an Ingredient sufficient, though at present it hath not been proved to you? But if it had been proved, I should not however think that is Treason. Then if this be the only difference between this Gentleman, and any other Person that shall be practising to Subvert the Government, I would know, if there be but one Witness against any Man, for conspiring against the King, if they may not have recourse to this Precedent, to proceed against him by Bill of Attainder? For the Argument is, Whosoever is endeavouring to Subvert the Government, provided there be but one Witness, you are obliged, by vertue of your Legislative Power, to bring a Bill of Attainder against him. And what then? Of what use is the great Care and Wisdom of your Ancestors, and your selves too, that where a Crime is so great, and the Punishment so great, there should be two Witnesses?

I was mightily surprized to hear Gentlemen tell you, That two Witnesses is a Form in your Law, and a Form in Inferiour Courts: I never could believe that was a Form; for according to your Law, no Man shall be declared Guilty of Treason, unless there be two Witnesses against him; so that it gives, in a manner, a Determination to the Crime; that I take to be the Case.

A Gentleman told you, That he was fully satisfied by the Proof, that this Gentleman is Guilty: But how can a Man satisfy his own Conscience, to Condemn any

any Man by a Law that is subsequent to the Fact? For that is the Case; and pray see the danger of Precedents: It now will appear upon your Journal that you have caused to be read, a Deposition of a Person that was absent, taken before a Justice of Peace, when the Person accused had no Opportunity to Interrogate him. and likewise that you have heard a Witness as to what a Man swore in the Tryal of another Man. All this will appear upon your Books.

And truly, I would be glad to know if another Age may not be apt to think that you took these to make good the Defect of another Witness; and then I must Appeal to you, if you have not admitted of a Testimony, which by no Law is admitted.

They say, you are not tyed to the Rules of *Westminster-Hall*, nor their Forms: Is there any Law in being that says, a Judge may hear a Witness as to what was Sworn upon the Tryal of another Person, to Condemn him that was not Party to that Tryal? If there be no such Law, then the Rule is founded upon Justice and Common Right, that nothing shall be brought against a Man when a Man was not a Party when the Oath was made, and he had no Opportunity to Examine him.

I thought it my Duty to tell you, That when you have made this Precedent, if any Person shall be Accused of Treason but by one Witness, there will be the same Reason to proceed thus against him.

Then (being a little before Eleven a Clock at Night) the Question was put, *Whether the Bill should be Committed?* And the House Divided.

Ayes 182.

Noes 128.

So it passed in the Affirmative, and the Bill was Committed to a Committee of the whole House.

Veneris 20 die Novembris, 1696.

The House Resolved into a Committee of the whole House upon the said Bill, and several Words being offered as an Amendment to the said Bill, to Import

Sir

Sir *John Fenwick's* being Guilty ; at last the Words that were Agreed on, were these, (*Of which Treasons the said Sir John Fenwick is Guilty* :) It was also Proposed to the Consideration of the said Committee, Whether the *Lords Spiritual* should stand in the Enacting Part ? But upon looking into several Acts of Attainder, it appeared they were mentioned in all of them, in the Enacting part, and so the Committee was satisfied in that Point ; and they were left to stand in the Bill by general Consent, and the Bill was Ordered to be Reported to the House ; and afterwards upon the Report, the House agreed with the Committee in the aforesaid Amendment of the Words, Importing Sir *John Fenwick's* being Guilty.

Mercurii 25 die Novembris, 1696.

The said Bill against Sir *John Fenwick* was Read the Third Time.

Mr. Methuen. Mr. Speaker, I have not troubled you in any of those long Debates you have had upon this Occasion, and do it unwillingly now ; but I do think it every Man's Duty, in a Case of this great Importance, freely to own his Opinion, and give his Reasons for it.

The greatest part of the Debate hath run upon two Things ; on the one side, the Inconveniency of Bills of Attainder, or at least the having them too frequent. On the other side, That it is necessary to have them sometimes, that no Persons might think they were out of reach, if they could evade the Laws that were made to Punish ordinary Offenders.

I think, both these Points too general, and that this Bill, as every other, ought to have its Fate upon the particular Circumstances of the Case before you ; and whoever gives his Affirmative to this Bill, ought to be convinced, that Sir *John Fenwick* is Guilty of High Treason ; and also, that there are Extraordinary Reasons why the Nation does Prosecute him in so

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Extraordinary a Manner; and I do think neither of these is sufficient alone.

If between the Indictment and Arraignment, or Tryal, *Goodman* should have died, and there had been no other Reason for Attainting Sir *John Fenwick*, but only the want of his Evidence, I should not have thought it a sufficient Reason, though we should have had an Opportunity of being informed of his particular Evidence, and believed him Guilty; and if Sir *John Fenwick* does not appear Guilty, I do not think any Reason of State can justify this Bill, though he hath Prevaricated, and behaved himself to the dissatisfaction of every body; therefore, I think, there must be both these.

You have heard the Evidence, I shall not repeat it, but rather come to those things that distinguish Sir *John Fenwick's* Case; only thus, you have received the Evidence against Sir *John Fenwick*, and given him Liberty to make his Defence, and have fully heard him, which I think hath altered the Reason of a great many Precedents cited from my Lord *Coke*, and other Authors.

That which Distinguishes this Case, is the great Danger the Nation was in from this Conspiracy, and the Sense the Nation hath had of it; and I find, by the general Opinion of all Persons, this Danger is not thought yet at an end.

There seems likewise to be an Opinion as general, That Sir *John Fenwick* could have contributed to your Safety by a Discovery.

The next Circumstance, is, that Sir *John Fenwick* knowing this, and the Expectation the Nation had from him, that he could have contributed to your Safety, hath made use of that to put off his Tryal; and at last, has made such a Paper as does shew an Inclination to do you all the Prejudice he can, and tended to the Creating of New Dangers, and by this means Sir *John Fenwick*, against whom there was two Witnesses when he was Indicted, hath delayed his Tryal,

Tryal, so that now there is but one ; and there is a violent Presumption, that this Person is withdrawn by the Practice of Sir *John Fenwick's* Friends.

There remains yet with me, as great a Consideration as any of these, The Publick Resentment of the Nation for such his Behaviour, is the only means his Practice has left you to prevent the Danger that yet remains ; and it seems necessary for your Safety, to come the next best way to what he could have done for you by his Discovery.

Against the Evidence that hath been given, there have been great Doubts raised, not so much whether it be such Evidence as ought to incline us to believe him Guilty : But whether it be such as you should hear in the Capacity you are in ; and whether after it is found such as it is, that is to say, not such as would Convict him upon another Tryal, Whether you ought to Credit it, and that it should influence you to give your Vote for this Bill of Attainder ? This is a Doubt that I find weighs generally with them that differ from me in Opinion about this Bill ; and therefore I desire leave to speak to that Particular.

'Tis said, That you are Trying of Sir *John Fenwick*, that you are Judges, and that you are both Judges and Jury, and that you are obliged to Proceed according to the same Rules, though not the Methods of *Westminster-Hall* ; *Secundum allegata & probata*.

But the State of the Matter, as it appears to me, is, That you are here in your Legislative Power, making a New Law for the Attainting of Sir *John Fenwick*, and for Exempting his particular Case from being Tryed in those Courts of Judicature, and by those Rules which you have appointed for the Tryal of other Causes, and Trying of it your selves, (if you will use that word, though improperly) in which Case the Methods differ from what the Laws made by your selves require in other Cases ; for this is never to be a Law for any other.

Methinks

Methinks this being the State of the Case, it quite puts us out of the Methods of Tryals, and all the Laws that are for limiting Rules for Evidence at Tryals in *Westminster-Hall*, and other Judicatures: For it must be agreed, the same Rule of Evidence must be observed in another Place, as well as *Westminster-Hall*. I mean in Impeachments, and it has always been so taken.

The Notion of two Witnesses being necessary, has so much gained upon some Gentlemen, that we have had it said, That this is required by the Law of Nature; the Universal Law of Nations, Nay, by the Eternal Law of God. And I think, if it was so, there would be no doubt but it would oblige us.

And therefore to go to the bottom of the Matter: That any Man deserves to be punished, is because he is Criminal. That this or that Man deserves it, is because he is Guilty of a Crime, let his Crime be made evident any way whatsoever; for whatsoever makes the Truth evident, is, and is accounted in all Laws to be Evidence.

Now the Rules for Examining whether any Person is Guilty or not, and the Evidence that is allowed as sufficient is different in all Nations, no two Nations agree in the same Evidence for the Tryal of Criminals, nor in the Manner of giving the Evidence against them.

Your Tryals differ from all other Nations, not only that you are Tried by a Jury, which is particular to you, but that the Witnesses are to be produced Face to Face before the Offender; and you have made Laws that there shall be two Witnesses in Cases of High Treason, and herein you are the Envy of all other Nations.

Sir, the Evidence that is to be given against Criminals, differs in the same Nation when the Offence differs; there is a difference between the Evidence that will Convict a Man of Felony, and the Evidence that is to Convict a Man of Treason; and the Evidence

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to Convict a Man for the same Crime, hath been different in the same Nation at different times. No doubt, by the Common Law of *England*, that Evidence, was sufficient to Convict a Man of any Crime which was sufficient to make the Jury believe the Person Guilty. Thus before the Statute of *Edw. 6* a Man might be convicted of Treason by one Witness, though that Statute was made upon great Reason, and appears to be for the Publick Good, by the general Approbation it hath received; but I don't think in your Proceedings here, you are bound by it.

But, Sir, it is said, Shall we that are the Supreme Authority (as we are part of it) go upon less Evidence to satisfy our selves of Sir *John Fenwick's* Guilt, than other Courts? And shall we resort to this Extraordinary Way in this Case?

Truly, if it did shake the Manner of Tryals below, I should be very unwilling to do it; but I do take it clearly, that it cannot make the least alteration in the Proceedings of any Court, but on the contrary, I think there is no stronger Argument for your resorting to this Extraordinary Way, than that of the Care and Caution with which your Law hath provided for the Defence of the Innocent. For if we consider all those Laws that have been made for that purpose, 'tis plain it must have been in the view of our Ancestors, that many Criminals might by this means escape. Your Laws are made for your Ordinary Tryals, and for those things that happen usually, and there is no Government we know in the World where there is not resort to Extraordinary Power in Cases that require it; your Government indeed hath this Advantage, That you can keep to Rules which others cannot: For in a very wise Government (as was observed by a Person that was in this House the last time this was Debated) all the ways of punishing Crimes of this Nature, are Extraordinary. Persons are condemned there, not only unheard, but they are condemned before they are accused,

accused, and that is thought necessary there, which will not be endured here: And yet that Government hath continued so many Hundred Years, and no endeavours have been to alter it, though so many Noble Families have suffered by it, because they are convinced as to their Constitution 'tis necessary.

The next Argument is from the Precedent you are about to make, and you have been told, whatever the other Precedents have been, what you do now, will be a Precedent for you and your Posterity, and whilst that Argument is used only to make you cautious, and to make you consider Well, whether it is according to the Duty to your Country to pass this Bill (which no doubt is the only Question before you) 'tis a good Argument.

Sir, if this Precedent shall appear to Posterity to be a Precedent of an Innocent Man, or a Person whose Guilt was doubted of, or one whose Guilt did plainly not appear, and this Bill should be carried by a prevailing Party, I do agree it was a very ill Precedent: But if the Case be, that this Precedent will appear to Posterity upon the Truth of the Thing, to be a Precedent made of a Man notoriously Guilty, of a Man that had deserved this Extraordinary way of Proceeding, and this general Resentment of the Nation, and that nothing could have hindered this Man from the Common Justice of the Nation, but his having endeavored to elude it in this Matter, and if it appears that you would not be put off so, but that your Indignation made an Example of this Man, I shall not be sorry it should appear to Posterity, but I believe Posterity will (as I think they ought) thank you for it.

Sir, I do say for my own particular, while I am Innocent, I should not think my Life in danger to be judged by 400 *English* Gentlemen, and the Peerage of *England*, with the Royal Assent; and when I reflect, I can't be of Opinion, That the Government could have procured a Parliament to have passed a

Bill of Attainder against my Lord *Ruffel*, or Mr. *Cornish*, or even Mr. *Colledge*; I don't think all the Power of the Government could have prevailed to have done that, although they could prevail to have them condemned by the Forms of Law; and here I see that a great many Gentlemen have opposed every step of this Bill, for fear of making an ill Precedent; yet those Gentlemen do believe in their own private Consciences, that he is Guilty; and I can't think, that any Innocent Person can be in danger by such a Bill, when Gentlemen oppose this Bill only upon the Prudential part, though they still confess him to be Guilty.

The Conclusion I make for my self is, That I am convinced in my Conscience (which I think is sufficient, when I act in the Capacity I now do) that Sir *John Fenwick* is Guilty of High Treason, and that there are Reasons so Extraordinary to support this Bill of Attainder, that I do not see how any Person that is so convinced, can refuse to give his Affirmative to this Bill.

Sir Godfrey Copley. Sir, I am very sensible a great deal hath been said upon this Subject; but I think there is something in Duty incumbent upon every Man, especially upon me, who can't concur with the general Sense of the House, to give my Reasons for my disagreement; and I will make use of no Arguments but such as I can't Answer my self: A great deal hath been said upon this Debate, by Gentlemen Learned in the Law; and many of these, though they have said they would not speak against the Power of Parliaments, yet the greatest part of their Arguments have touched upon your Method of Proceedings; and to shew you how they interfere with the Rules of *Westminster Hall*, so great is the force of Custom and Education; but I acknowledge some have brought us Arguments quite of another strain.

I take the Punishment of Offenders to be one of the necessary Supports of all Governments, and all Societies

Societies of Men have laid down to themselves some Rules, by which they judge whether Persons accused, are Innocent or Guilty; therefore in a Matter of this Extraordinary Importance, it is proper to consider what Rules we have to go by.

It is the Custom and Law of our Nation to require two positive Witnesses to prove Treason, and though I think without the utmost necessity it is not prudent to deviate from that Rule, yet I will not Argue from thence that we are tied up to it; no, it is most certain on the other hand, that the Legislative Authority, which hath Power, if they think good, to Abrogate all Laws now in being, cannot be tied up to any Rules of Humane prescription. But, Sir, there are the Eternal Rules of Equity, and Justice, and Right Reason, and Conscience; and these I think are unalterable, and never to be swerved from; and therefore I shall take the Liberty to see how far agreeable our Proceedings are to these Rules.

Sir, I look upon it as a Fundamental Breach of these Rules, for an Accusation to be given in against a Man behind his back, by he knows not whom, or by any with whom he is not confronted and brought Face to Face.

I am one of those that look upon Sir *John Fenwick* to be Guilty, and there is a Proof of it by one Witness; and to this you have added an Indictment that is proved. Now, I must needs own, that I think that to be so far from giving any Credit or Strength to the Evidence, that in my Opinion the Injustice which attends it, makes the Scales lighter than they were before. For if any Bill or Writing Sworn behind a Man's back, may be used as part of Evidence, I do by parallel Reason Argue, that the like may make up the whole, at one time or other; and then the Information of any two profligate Knaves before a Secretary of State, or a Justice of Peace, shall be sufficient, without any Living Testimony, to make a Man run the hazard of his Life.

Then, Sir, I am not at all convinced of the Necessity of this Proceeding; I must confess that those that brought this Matter before us, are much wiser than I, and therefore I will not Examine what Reason they had to do it: But it is so little agreeable to me, I wish it had not come here. But is it to be supposed, that your Government is in hazard by any Man that is fast in *Newgate*? Can any Man think that Sir *John Fenwick* can do any thing in his Condition to hazard it? Can you expect that a Man that hath been six Months in Prison, and no body came at him, that he may make such a Discovery as may be worth your while? But suppose you had a Man of Invention and Practice, what a Spur do you put to it? May not a Man of Parts, when he hath no other way to save himself, may not he form such a Plot, as (should it gain belief) might make the best Subjects in *England* tremble?

'Tis not Sir *John Fenwick's* Life which I Argue for, I do not think it of so great Value, to deserve so long and solemn a Debate in this House, nor the Consideration of so great an Assembly after this manner. But I do say, if this Method of Proceeding be warranted by an *English* Parliament, there is an end to the Defence of any Man living, be he never so Innocent.

Sir, I remember I heard it mentioned on the other side of the way, by an Honourable Person, who never lets any Argument want its weight; That King *James* Attainted a great Number of Persons in a Catalogue, in a Lump. Sir, I am not afraid of what Arbitrary Princes do, nor an *Irish* Parliament; but I am afraid of what shall be done here: I am concerned for the Honour of your Proceedings, that it may be a Precedent to a future Parliament in an ill Reign, to do that which I am satisfied you would not do. I had some other Thoughts, which I cannot recollect, though these Reasons are sufficient to convince me.

Mr. *Foley*, the Speaker's Son. Sir, the Worthy Gentleman that spake first upon this Debate, calls me up: He

He said, That he thought in this Matter, every one ought to give the Reasons of his Opinion; and in giving the Reasons of my Opinion, I do solemnly Protest, I do it with the same Sincerity as I would do, if I was upon my Oath, and of a Jury.

The Worthy Gentleman said, That if there could be any danger from this Precedent, that an Innocent Man might lose his Life, he would not be for it; I desire that he would consider, whether there be almost any Instances of any Innocent Men that have lost their Lives, but what has proceeded from Precedents that have began upon Guilty Men. The same Gentleman told you, That if we did not believe Sir *John Fenwick* to be Guilty, no other Consideration ought to move us to be for this Bill. Now the Reason I am against this Bill, is, because it does not appear to me from the Evidence that hath been given at the Bar, that Sir *John Fenwick* is Guilty. And I do think that, which is not Legal Evidence, is no Evidence; and I do think, That all the Lawyers that have spoke in this Matter, have allowed it to be no Legal Evidence. And I desire Gentlemen will consider, if it has been thought unreasonable that Men should be convicted upon such Evidence, Why now it should be said to be necessary? I think a Saying of my Lord *Strafford* upon his Tryal very applicable to this Case; If a Pilot was to direct a Ship in a dangerous Sea, and there was no Buoy to Direct his Course, if he then split his Ship, he was Excusable; but if there was a Buoy up, then he was Accountable for it. Now, comparing our Government to the Sea, there have been many Rocks and Sands, and many Men have lost their Lives by them, but the *Treason Bill* seems to be set as a Buoy to avoid that Mischief for the future. Now, if we split upon these Rocks, I shall think we are but ill Pilots.

Upon a former Debate we were told, We are not tyed up to the Rules of *Westminster Hall*, and it was sufficient to justify a Man in giving his Vote for this

Bill, That he was satisfied in his own private Opinion that Sir *John Fenwick* was Guilty : See the Consequence of that, I do believe in my own private Opinion as much as any body that Sir *John Fenwick* is Guilty, but in Things that I have as much believed as I do this, I have found my self mistaken.

When a Jury acts according to Legal Evidence, that they have no Reason to mistrust, they are in no manner of blame : And if this Gentleman should prove Innocent, when you have taken away his Life, and his Estate, and ruined his Family, all that you have to say for it is, That you have acted according to the best of your own Understandings, guided by your own private Opinion.

Were this the Case of Sir *John Fenwick* only, and I not to give my Vote ; I reckon him so despicable and because I believe him to be a Traytor, and I think the worse of him for the Part he hath acted since he was in Custody, I should not concern my self about it. But when I speak against this Bill, I speak on the behalf of all those that may hereafter suffer by such a Precedent as this. Those Precedents that have been urged, don't come near this Point. And though the Power of the Parliament is above that of other Courts, yet there hath been no Precedent that comes up to this, That we should pass a Bill to Attaint Sir *John Fenwick*, because he will not give Evidence, or there is no Evidence against him, If Sir *John Fenwick* be to be Hanged, because there is but one Evidence against him, any Man in the World may ; and then I think every Man's Life depends upon it, Whether this House do like him or not. Consider what Opinion you your selves have of the Judgment of Parliament in Cases of Election ; I think if this Bill does Pass, every Man's Life will be as precarious as his Election.

We have been told, how much Danger the Government will be in, if this Bill does not Pass : I have as much Zeal for this Government as any Man ; but
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all the Government is concerned in it is, That a Man that you think a Traytor should live. And I do think the Government is no more concerned in his Life, than in the Living of any *Jacobite* in *England*. But, on the other hand, I think the Lives and Liberties of the Subjects of *England* are concerned, and, by this Bill, you will make all their Lives and Liberties precarious.

I am not for bringing the Blood of Sir *John Fenwick* upon me, or my Posterity; nor can I give my consent to a Precedent for them to be Hanged without Evidence.

Lord Cutts. The Worthy Member that spake last but one told you, that he thought the Life of Sir *John Fenwick* was not worth the Consideration of this Assembly; I do differ from him in that. If the Scripture tells us, That the most insignificant Creature does not fall without God Almighty's Consideration, I think the Life of a Gentleman may be thought worth ours.

The Worthy Gentleman that spake last told us, That he did believe in his Conscience Sir *John Fenwick* to be Guilty: But because he hath found himself Mistaken formerly, when he believed Things with the same appearing Certainty, therefore he may be mistaken now. I hope Gentlemen will not press an Argument upon our Judgments, from Precedents that are only Mistakes: I do agree, That any Man may be mistaken in a Thing which at that Time he thinks himself most certain of; but till that Mistake appears, I say, it ought not to make him doubt of any Thing that he does clearly and distinctly perceive: If otherwise, there is an end of all Religion and Law; and it shakes the Foundation of the most certain Belief a Man can entertain.

As it appears to me, some Gentlemen seem to lay a greater stress on some Things than they deserve, and are not pleased to answer some Arguments; and therefore I desire leave to speak to two or three Points

in short, I shall not say any thing of the Authority of Parliaments, it speaks it self; nor of the different Consideration of our Proceedings, and that of Inferiour Courts, that seems to be agreed: But I shall apply my self particularly to mention some Things upon Sir *John Fenwick's* Case, and in that take care, as near as I can, not to trouble you with any Thing I have said upon this Subject.

I can't but observe, That every Gentleman that speaks against this Bill, begins with an Introduction that he believes him Criminal, which does somewhat astonish me; I hope they will Explain themselves a little. But to the Point, as to Sir *John Fenwick's* Case; I did take the Liberty in a former Debate to observe, That it was not only a Conspiracy against the Lawful King of *England*, but also for the bringing in a Tyrannical and Foreign Power upon you. But there is one Consideration I did not mention then, because I thought what I said carried so great Weight, it needed it not; I do say, not only as a Christian, as an *Englishman*, and as a Subject of this Government, against which he hath committed a Crime of the highest Nature: But I will say, as a Man of Honour, that he hath acted contrary to the Rules of Honour; I think Sir *John Fenwick* had made a much better Figure, if he had appeared in Arms in *Flanders*, where he might have Charged this Prince at the Head of his Troops, than basely to have contrived his Death in this manner.

Sir, I have only one Thing more that I desire to speak to (for what I say, is more for my own Information than to decide any Man's Opinion further than he agrees with it: I say) most Gentlemen have likewise owned, That if they thought this an Extraordinary Case, they would be for this Bill. I do say, as it appears to me, I do think, if ever there was an Extraordinary Case, this is one; and if ever any Government was in Danger, this is, or may be, upon your Resolution to Day. A great deal of stress hath been

been laid upon this Argument, That Sir *John Fenwick* is in Hold : I take that to be nothing ; for they keep a Combination together still ; 'Tis by Rewards and Punishments that all Governments are supported. Robberies, that were so common in *France*, that you could not walk after it was dark, by Punishments they have brought it to that, That you may ride from one end of it to another, with a Purse of Gold in your hand. And if you think it a Trifling Matter, That wicked Men that have such Inclinations should escape, I don't doubt but you may have Plots every day.

I don't doubt but this Gentleman knows a great deal that he hath never laid before you ; I would not be thought to press it as an Argument that he should be Condemned, because he won't Confess ; but I will be bold to say, if he does know of a great many Persons that have been concerned in this Business ; if he knows of a Rising that was designed, when this Conspiracy was to be Executed ; (and it may be Executed still, if Things shall be ripe for it) I say, though you keep him in Hold, it will be an Encouragement to them to go on in their Cabals, in buying of Arms, &c. I think the Matter before you is no less than the Fate of *England*, and the Fate of *Europe*, and of all your Posterity ; I am sure it is : And give me leave to say to you one Thing that is Matter of Fact, There are those Stories insinuated abroad, and those Matters of Fact asserted, with relation to a Conspiracy, and reviling this House, that are not fit for me to repeat. But your Enemies last Year, before the breaking out of this Conspiracy, had the same sort of Meetings, and the same sort of Discourse, as they have now. I will end with protesting to you, That I deal with Sir *John Fenwick* with the same Candour and Honour, as I shall always desire to be dealt with my self.

Sir Godfrey Copley. That Noble Lord misunderstood my meaning, as to the small Value I put upon Sir

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John Fenwick: I meant, That *Sir John Fenwick*, considered as a Private Person, accused in another Place, it was not worth while for this House to act in their Legislative Capacity upon him.

Sir Charles Carteret. I think this Bill is of very great Moment, and ought well to be considered before it Passes; for when it is passed, it will be too late to retrieve the ill Consequences which may attend it: There is so much Roguery in the World, I think it a hard Matter to arrive at the Truth. 'Tis not long ago there was a Plot contrived by one *Young*, and others, against the Bishop of *Rocheſter*, and so cunningly contrived, that if a Bill of Attainder had been brought in against the Bishop of *Rocheſter*, before the Truth had been discovered, I do not know what might have been the Consequence of it. I suppose no body questions the Truth of this Plot; but God forbid that every body that hath been named for it, should be Guilty. It may be true, That there was such a Meeting that *Sir John Fenwick* is Accused of being at, and yet *Sir John Fenwick* might not be there; and I do not think it sufficiently proved, and therefore I can't give my Consent to this Bill.

Mr. Manley. Sir, I have, as well as I could, attended to your Debate in this Matter; and I did not trouble you in the last Debate, because I was willing to take all the Opportunities I could to inform my self.

'Tis to me an extraordinary Thing, not only for the Matter, but the Manner of your Proceedings, which, considering all Circumstances, appears to me to be not only not Common, but Unprecedented; and as we are all in this Matter Judges, so I hope we shall apply our selves to consider of it with that Temper, as may lead us to give a right Judgment. And if I had never so great Obligations upon me, and Dependence, though from the Crown, I would lay them by, at least they should not influence my Judgment in this Matter. We are to pass Judgment in a Matter of Life and Death upon this Person, and 'tis urged

urged we should do it, because the common Course of Justice will not reach him for the Crime objected against him, which is High Treason, The Species of that Treason as it is laid in the Indictment is, &c.

Sir, the Evidence that hath been given to support it, hath been the Affirmation of a single Witness at the Bar : Indeed other things have been alledged in the Bill ; but as hath been said in *Westminster-Hall* upon another Occasion, They look only like Pepper and Salt to me ; for in themselves they are not Crimes (I speak with submission to your Judgment) at least to bare Company with an Accusation of High Treason.

As to the Evidence ; first, Capt. Porter tells you, That Sir *John Fenwick* was at a Meeting at the King's Head, and at Mrs. *Mountjoy's* afterwards, when there were Treasonable Discourses amongst them, and *Charnock* was directed to go into *France* ; but the End of that is not proved : For the Witness that told you of those Meetings, did not tell you, as I observed, that *Charnock* did go to *France* ; and what he said upon other Occasions, is no Evidence to me. And though we are not tyed up to the Rules of *Westminster-Hall*, I am so young a Member, I know not what Methods are observed in Parliament, that I may in some measure make them a Rule to me.

The Law of *England* requires two Witnesses upon the greatest Reason ; and 'tis not only the Policy of *England*, but the general Consent (in this Case) of the whole World, and it is grounded upon the Law of God. A Gentleman said the other day, the Law of God required two Witnesses, and a Gentleman, who is very near allied to one, from whom he might have early informed himself, made us a Challenge, to shew him where it was to be found : If he will look into *Numbers* and *Deuteronomy*, there are three particular Texts very plain in it. The Reason of this is illustrated in the Story of *Susannah*, her Safety depended upon it ; and the Jews, when they prosecuted our Saviour,

Saviour, though they wanted no Malice, nor nothing to animate them, to put him to Death; yet, *St Matthew* tells us at last, there were two Witnesses found against him; and this being the Law of the Land, and the Law of God, it must be my Rule. I must have this Matter proved against Sir *John Fenwick*, as fully as the Law of the Land, and the Law of God requires. The other Evidence brought to maintain this Bill, is what is Sworn by *Goodman* before a Justice of Peace, and the Account of the Evidence given by *Goodman* to the Grand-Jury, which I must confess I declare I am very far from being convinced ought to have Weight with us: But, I think, they must lay a great Weight upon it, who gives their Vote for this Bill, or otherwise they must give their Vote upon the Testimony of one Witness.

The Reason for this Extraordinary Proceeding is, 'tis urged, there is a Necessity for it; the Plot will be lost else, say some; Sir *John Fenwick*, say others, will escape else. As for the Plot, I wish to God there were no such Persons; but 'tis probable the best way of ending this Plot would be, if His Majesty in his Wisdom thought fit, to interpose with his Mercy and Grace at this Time; and better than for the Legislative Power, in an extraordinary Manner, to take off a Person against whom there is not a Legal Evidence. Gentlemen say, they are convinced in their Consciences; but I will appeal to their Consciences, Whether there be Legal Proof against him: And shall we then interpose, in an extraordinary manner, to take away his Life?

No Man pretends to Answer, but that this Proceeding may be dangerous to Posterity; if we had any Security this might be done without that Danger; it might be some Encouragement to Gentlemen to come into it: But since it may be dangerous, are not we, who are entrusted by the People, to have an equal Care of the Liberty of the People? We are to take Care of His Majesty's Life and Government; and

and the Reason is, because upon him, and his Government, the Publick Safety does depend. 'Tis *Salus Populi*, is the great Reason that the Law takes such Care of the King ; and as we are to do nothing to the detriment of the King, so we are to do nothing for the King that may be of detriment to the People.

An Honourable Lord hath been pleased, to say, We are not yet out of Danger : I am sorry to hear it, and could not think it, when so Noble a Lord is so near the King, and hath so great a share in taking Care of the Publick Safety. But sure nothing can happen from this Person ; there hath been care taken he should have no Conversation with any Body : If I thought there was a Hazard to the Government, or to the King, and no way to secure us, but taking away this Gentleman's Life ; such a Reason as that would make me go Counter to my own Reason and Judgment. But I can't be of Opinion, That a Man of Sir *John Fenwick's* size, who in his best Circumstances indeed, is a Gentleman by Birth, and hath a Gentleman's Fortune, but is now in a great measure without his Estate ; so his Fortune can't do any hurt, and his Alliance I suppose is not Considerable enough to do any neither.

Then as his Circumstances do not make him so Considerable, as to do us any hurt ; let us take care that we do not, in the Case of his Blood, wound our selves.

Gentlemen lay but little stress upon the dangerousness of the Precedent, I do lay more ; and 'tis chiefly upon that Reason I can't come up to be for this Bill. I would not that so good a Parliament should lay the Foundation, by which in after Ages the best Men in *England* may suffer ; 'tis said, An ill Parliament will not want a Precedent, but will make use of their Power : But they will fall sooner into it, if led by a good Parliament.

Sir,

Sir, this is a Matter I would not have presumed to have troubled you in ; for I can't think any Thing I can say, will have any Weight with any one that is not of my Opinion : But as an *English-man*, and I have the Honour to be of this House, when a Thing of this Nature comes before us, and I am to give my Opinion as a Judge in it, I was willing to give my Reasons for my Opinion. I think this Bill is unprecedented ; and you will give me leave to say, it appears to me to be unreasonable. I think it contrary to the Fundamental Rules of Reason and Justice ; I doubt it may be dangerous to our Constitution ; and I fear future Ages may have Reason to Repent what we do. And therefore I am against this Bill, and I hope it will not Pass.

Sir Will. Strickland. Sir, I do assure you I shall not in any Thing of this Bill, or any Thing else, run counter to my Conscience or Judgment : But I do think, and I think few deny it, I do think in my Conscience that Sir *John Fenwick* is Guilty ; and thinking him so, I ought to condemn him. I do think if we should spare this Gentleman for want of Form, as they call it, now we are in our Legislative Capacity, and there should be any ill Effects of it ; and other People, by thinking they might avoid Punishment by the Forms of *Westminster-Hall*, should have the like Imaginations against His Majesty, and they should take Effect, I should think my self in a great measure Guilty of that Misfortune. I think the Kingdom is concerned, and the King's Preservation, in this Bill ; and I hope you will Pass it.

Mr. Dolben. Mr. Speaker, I am against the passing this Bill, and shall, with as much Brevity as may be, lay before you the Reasons why I am against it ; and probably I should not have troubled the House with them, (in regard I was not present at the second Reading of the Bill) but that I think it necessary to justify my Opinion in a Case of this Importance.

I admit

I admit that the Fact charged upon Sir *John Fenwick* is an Overt-Act of High Treason within 25 of *Ed. 3.* though I must take leave to say, That a Judgment upon a Case at least as strong as this, has lately been much Controverted and Arraigned: However, I am told, that those Authors, whose Opinions in that Case were so strait-lac'd have thought fit to enlarge their Notions, with respect to the Case now before us. But it is not my intent to Dispute the Nature of this Fact; for, I am perswaded, that to consult how to procure an Invasion upon the Kingdom with Foreign Force, is an Overt-Act of Compassing and Imagining the Death of the King. And I think the Charge contained in this Bill against Sir *John Fenwick* amounts to such an Overt Act. But I beg leave to reflect. How far Overt-Acts of this Nature, which fall directly within any Species of Treason mention'd in 25 *Ed. 3.* I say, I desire it may be considered, how far *such* Treasons are cognizable in Parliament. That they are cognizable by the Absolute Supream Power of Parliaments, there is no doubt. But *Power* is to be understood in Cases of this Nature according to the Law-Maxim, *Id possumus quod jure possumus.* And therefore the Question will be, Whether Treasons of that kind are cognizable here, within the intent and meaning of the Law of 25 *Ed. 3.* Now, I take it, that Statute was made, in order to be the certain Rule and Standard whereby to judge of Treasons; not only, as to the Matter of them, what shall, from thenceforth be held Treason, what not; but likewise as to the way and manner of Determining Treason, with relation to the Judicature. That is to say, How far, and in what Cases *the Justices* may proceed to Judgment; and what Cases are reserved to the Judgment and Cognizance of *the Parliament.* And this Distinction in point of Jurisdiction will (I think) appear very plainly upon consideration had of the Words of 25 *Ed. 3.* That Statute first enumerates several Species or Branches of Fact, which it says shall be adjudg'd High

High Treason ; that is, by the Justices. Then, it goes on, and says, *If any other Case supposed Treason, not specify'd in that Act, doth happen before any Justices, the Justices shall tarry, without any going to Judgment of the Treason, till the Cause be shew'd and declared before the King and his Parliament, whether it ought to be judg'd Treason or Felony.* That is, or a Crime of a different Nature, (for in the Old Books, *Felony* imports any heinous, profligate Offence.) This, with Submission, is to me, a Demonstration that the Intention of the makers of this Law, was, That such Treasons as came directly under any of the Heads enumerated in the Statute, should be left, and be appropriated to the Decision of the Inferiour Courts : But, that Facts of another Complexion, not reducible to any of the Particulars enumerated, such as Enormous Offences, and misbehaviour of Magistrates and Great Men, or of Corporations, Companies, and the like : Those indeed shou'd be reserv'd to the Judgment and Censure of the Parliament, who alone are a Match for Powerful over-grown Offenders, whom the ordinary Justice of the Kingdom cannot grapple with. And as this seems plainly to be the Intention of the Act, so, I think, the Instances have generally been pursuant to that Intention. For I know but of one single Instance where a Person has been Attainted by Bill for no other Treason than what is within 25 Ed. 3. And that Attainder was afterward revers'd by Act of Parliament, as I shall presently make appear. 'Tis true, where Persons have been out of the reach of the Law, in open Rebellion, or fled from Justice, the Parliament has sometimes thought fit to interpose, and Attaint them ; as in the Case of Sir *John Mortimer* ; and others, who made an Escape out of the Tower ; and the Case of such of the *Regicides*, who were either dead, or fled from Justice, (for ev'n of those villanous Offenders, none other were Attainted by Parliament, the rest being left to the ordinary Prosecution) likewise the Case of the Duke of *Monmouth*,

Monmouth, who being in open Rebellion, was so Attainted. But I say, I have not met, upon the best search, I could make, more than one Precedent of a Person in Custody, Attainted by Bill, for such Treason only as is within 25 *Ed* 3. And that was the Case of *Hall*, Attainted for adhering to the King's Enemies. (For tho' Lord *Cromwel* and others were also in Custody, yet their Bills of Attainder were grounded on other Matter, and not upon the Statute.) But, to go a step farther, I think I may confidently affirm, there is not so much as one Precedent where a Person, who not only was in Custody, but had been actually prosecuted in the Ordinary Method, had been Indicted, Arraign'd, had joyn'd Issue with the King, and that Issue was to have been Try'd by the Verdict of Twelve Men, in order to the Acquittal or Conviction of the Prisoner; where, after all this Proceeding, such Person was taken away from his Tryal, and debarr'd the benefit of the Judgment of his Peers, the benefit of his Challenges, the benefit of his Exceptions to the Indictment (if insufficient) and cut off extrajudicially by an Act made on purpose, *Ex post Facto*. I must declare, I never met with any Instance of this kind, nor indeed with any thing in any sort parallel to it, ev'n in the most Tumultuous Times, unless it be the Case of my Lord *Strafford*: And I believe no body that reads the Preamble of the Act for Reversing his Attainder, will rely upon that Proceeding as a Precedent for what we are now a doing. In the Preamble it is said, That *the Turbulent Party did attempt the procuring of that Act, on purpose to Condemn him, seeing no hopes to effect their unjust Designs by the Ordinary Method of Proceeding*. This shews the Opinion of our Predecessors concerning courses of that Extremity. They esteem'd it contrary, not only to the Fundamental Laws of the Realm, but ev'n to the Fundamental Rules and Principles of Common Justice (by which certainly Parliaments ought to be govern'd as well as Inferiour Jurisdictions) That when a Person

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had

had been under Prosecution by the Ordinary Method (as the Case was of that Noble Earl) he shou'd afterward be wrested from that Prosecution, and made a Sacrifice by an Extraordinary way of a Bill of Attainder, because by the Ordinary way that had been begun, the Design against him cou'd not be effected. And as great Discountenance has been put upon other such-like unjust Bills of Attainder in preceding Times.

In the Reign of *Edw. 3.* *Roger Mortimer* was Attainted by Parliament; but afterward, in the same Reign, his Attainder was Revers'd, and the Reason declar'd, because *he was Attainted against the good Laws and Customs of the Kingdom.* So the Case of *Hall*, whom I mention'd before, as the only Person (within my Observation) who being in Custody, was Attainted by Bill, for Treason within *25 Ed. 3.* his Attainder was likewise Revers'd, with this Solemn Declaration, That, for the future, *Touts Trials seront selonque les bons leys del Realm.*

Another Attainder there was of *Sir Thomas Hauxey*, which was also Revers'd, and declared to be against Law. Then, there are the Attainders of *H. 8's* Time which I than't particularize. But I beg leave to make this Observation upon them in the general; That not only all the Histories of those Times, and our Law-Books condemn them as most grossly contrary to Law and Justice, but the Statute of *1 Ed. 6. c. 12.* seems (in my Opinion) to have been directly levell'd at those Attainders in the Reign immediately preceding: For it says, That the Proceedings in King *H. 8's* Time were grounded upon Laws that were *Extream and Terrible*: And therefore that there might be no more such Terrible Proceedings for the Time to come, it reduces all Treasons to the Ancient Standard of *25 Ed. 3.* and goes on, and Enacts, That no Man shall be Convicted or Condemn'd for Treason, but upon the Testimony of *Two Lawful Witnesses.* Now I take this Law to be so general, as to extend to all

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Convictions and Condemnations for Treason, of what Nature soever they be, and consequently that it must extend ev'n to Bills of Attainder, since those are the Highest and most Powerful Convictions and Condemnations.

The Preamble I just now recited, is an Argument for this Opinion, *Because Persons were condemn'd in the former Reign by Laws that were Extream and Terrible: Therefore be it Enacted, That none from henceforth shall be condemn'd, but only upon the Testimony of two Lawful Witnesses.* So that every Law which Condemns a Person for Treason, otherwise than upon the Testimony of two *Lawful Witnesses*, is a Law *Extream and Terrible*; and therefore entirely opposite to the Direction of this Act. Let us then see whether the Bill of Attainder now before us, be supported by such Evidence as that Statute requires. There was indeed one Witness, and (for ought appears to the contrary) a Lawful one produc'd: But instead of another, the Counsel have produc'd a Record, to which Sir *John Fenwick* is no Party, and the Depositions of a Person who never was cross-examin'd, nay, whether he be living or dead, *non constat*. I have not heard it affirm'd by any Gentleman who has spoke for the Bill in this Debate, That such sort of Proof is equivalent to a second Witness. But in Answer to the Objection of two Witnesses being necessary in this Case, two things have been suggested. First, 'tis said, That this Rule of Evidence, though establish'd by an Act of Parliament, do's not oblige us here, because this House is part of the Legislative Authority, which no Law can bind. Sir, that Assertion is undoubtedly true, with this distinction. 'Tis most certain the Legislative Authority cannot be so far bound by Laws, as to be foreclos'd of the Power of *Repealing* them. But, under favour, whilst the Laws continue unrepeal'd, every Branch of the Legislative is as much bound by 'em as Inferiour Powers and Authorities are bound: And therefore I can't agree

with the Gentleman who spake last, That what the Laws require, as to Evidence and Tryals, is only *Form*. Sir, Forms are in their Nature things meerly Discretionary, and are so far from binding this House, that they are alterable ev'n at the pleasure of the Courts where they are practis'd, as frequent Experience shews. But the requisites of a Statute are of another Nature ; those have been always understood to be not Forms, but *Rules*, which (whilst the Statute is in force) are binding every where, to all Powers and Authorities, the King himself not excepted, and this is the Lord Chief Justice *Vaughan's* Distinction, That though we be not bound by the Forms of Law, yet we are unquestionably bound by the Rules of Law. And ev'n in this Case of Sir *John Fenwick*, every body allows we are bound by an Act of Parliament, as to the *Nature of the Fact*. We all Judge the Fact charg'd upon him to be High Treason, because 'tis an Overt-Act of Treason within the Statute of 25 *Ed.* 3. Why then is not our Judgment as much bound to the other Act, with respect to the *Proof and Evidence* of that Fact? If 25 *Ed.* 3. be so far binding to us, as to prescribe us a Rule, whereby we must determine in Cases of this Nature what is *Treason*, and what not ; why shall not the Statute of *Ed.* 6. be equally binding in prescribing us a Rule, whereby to determine what is *Evidence* of Treason, and what not?

The other Thing suggested by way of Answer to the Objection of Defective Evidence, is, That if a second Witness be wanting in this Case, that want is occasion'd by the Practice of Sir *John Fenwick*, or his Agents, by causing *Goodman*, who was the second Witness, to withdraw. This is indeed suggested, but will any Gentleman say it has been prov'd? Has any Evidence been produc'd, that Sir *John Fenwick* or his Agents were Guilty of that Practice? So far from it, that the Bill does not charge *Goodman's* withdrawing on Sir *John Fenwick*, or his Agents. It only says,
Whereas

Whereas Cardel Goodman, one of the Witnesses against Sir John Fenwick, is withdrawn, so that he cannot be had to give Evidence; and then follows the Attainting part. So that you are going by this Bill to Attaint one Man for another Man's fault: Because Goodman, who might have been a Witness against Sir John Fenwick, is withdrawn, Therefore be it Enacted, That Sir John Fenwick shall be hang'd, though it be neither prov'd nor charg'd that the withdrawing was by the procurement, or so much as with the privity of Sir John Fenwick, or his Friends. Is this Parliamentary Justice? But I will suppose, for Argument-sake, that Sir John Fenwick, or his Agents prevail'd with Goodman to withdraw, what shall be the Consequence of that? Shall it therefore follow, that Sir John Fenwick must immediately be put to Death? God forbid! I think there is no parity between the Crime of Seducing away a Witness, and the heavy Judgment of Death. A more Reasonable and Natural Inference may be this: That because Sir John Fenwick has tempted away a Witness, therefore make a Law, that the Depositions of that Witness shall be of as good Force and Efficacy against Sir John Fenwick as if the Witness were here, and gave Evidence *Viva voce*. I say, this is the more justifiable proceeding of the two; for by this means you will not take from the Prisoner the benefit of his Tryal by his Peers, nor the benefit of his Challenges, nor of his Exceptions to the Indictment (if it prove insufficient) all which are his undoubted Right, whereof he is totally depriv'd by this Bill. Sir, I desire to make one Observation concerning Bills of Attainder in general, which methinks shou'd restrain us from being very forward to push them on. These Bills (like *Sisyphus's* Stone) have frequently roll'd back upon those who were the chief promoters of them. Of this, the Lord Cromwel's Case is a known Instance: That Lord was the first who advis'd this violent Proceeding in H. 8's Reign. And 'tis the Observation of great Authors, That the

Advice he gave his Master to the Ruin of others, prov'd, not long after, Fatal to himself.

Sir, upon the whole Matter, this being the last time we shall have an Opportunity of Considering this Important Case, I must take the Liberty to declare freely my Opinion, That if I consent to the Passing this Bill against Sir *John Fenwick's* Life upon any other Grounds than what are entirely Justifiable by the Laws of God and Man, I am Guilty of the Death of Sir *John Fenwick*. I am not satisfy'd I can give my Consent to this Bill upon those Grounds, because it is contrary to 25 *Ed.* 3. which intends that all Treasons therein specify'd, shall be Try'd in the Courts below by the Justices. 'Tis contrary to the Statute of *Ed.* 6. which requires Proof of Treason by two Witnesses, contrary to the Act for Reversing the Lord *Strafford's* Attainder, which utterly condemns the proceeding by Bill after a Prosecution begun in the Ordinary Method (which Act is undoubtedly grounded on the Fundamental Law of our Constitution.) And lastly, 'Tis contrary to Natural Justice, That a Man shall be Attainted of High Treason by Bill, when there is not one Word in the Bill whereby it appears that either he or his Agents are in the least Guilty of what is alledg'd as the main Reason and Justification of the Bill. So that in a Word, Because this Bill of Attainder flies in the Face of Statute-Law, Common Law, and Common Justice, therefore I am against it.

Sir Edw. Seymour. Mr. Speaker, you all know I have born my Testimony against this Bill, being not perswaded that it is just. Now we are come to the finishing part of it: And I shall lay before you those Reasons that prevail with me, and submit them to the Judgment of the House; and if I am more tedious than I use to be, I hope the occasion is such, that you will Pardon me, for I will endeavour to contract my self in as near a compass as I can.

I shall

I shall not trouble you with any Arguments that have been laid before you already ; nor shall I enter into the Examination of Precedents ; a great many have been laid before you, and a great many of them have been Reversed, most of them ; and the Reason why they have been Reversed was, because the Persons Condemned, have not had the due benefit of the Law : And if that be a good Reason for Reversing of such an Attainder, 'tis a good Reason why you should not do it.

I can't but take notice, That the beginning of this Bill in the House of Commons is the first step of this kind, that hath been made in Parliament, except that of the Duke of *Monmouth* ; and the Reason of it, I take to be this, because you hear not upon Oath ; you Condemn not upon Oath : You, nor the Party under Accusation have that Advantage against a forsworn Evidence, as there is in the other House ; the Method has been to pass such Bills in the House of Lords, and transmit them hither, upon which you then Judge.

I think, in this Case, you have no Evidence ; and instead of two Witnesses, you have no Witness at all ; for as to *Goodman*, *De non apparentibus, & non existentibus eadem est ratio*. As to *Porter*, he hath been Examined ; but when you consider that he was a Person engaged in this Conspiracy, and that he had no Repentance of his Crime till he was discovered, and then he comes to be an Evidence ; how far that shall sway with you, I submit ; but thus much I may say, every Man must allow me, that in far less Cases no Man that does swear for himself, or upon his own Account, is to be admitted as an Evidence. If a Robbery be committed in an Hundred, though a Man be but to pay a Groat towards it, he shall not be an Evidence ; how much more then in this Case, when a Man comes to swear to take away another Man's Life to save his own ; for he is not in the condition of a Freeman, who gives his Evidence without Check or Controul, but he is drudging on for his Pardon, as

the Counsel told you, which depends according to the Evidence he does give or not give.

For my part, I can't go so far as some Gentlemen have done, to say, Sir *John Fenwick* is Guilty; for where there is no Law, there is no Transgression; a Man that is guilty, must be guilty according to the Law: And the Law hath required and said, That there shall be no Treason but what is proved by two credible Witnesses, and here it appears that you have not one. The same Law that calls it Treason, says, it shall be so proved; then if you pass this Bill, you make that Treason which before was not Treason.

Sir, the Law does require two Witnesses, and there is Divine Authority for it too: It hath been hinted at, the place in *Numbers*, *No Man is to die upon single Evidence*; and it says, *These are the Statutes you shall observe throughout your Generations and Dwellings*: But I will go a little further, because a Worthy Gentleman declared, there was no such Law of God. He will find in the 19th. of *Deuteronomy*, a Case just as 'tis here; for the Case of High Treason was Idolatry at that time, and the Law says, *Whosoever shall set up Idols, shall be Stoned to Death*; but it says, *No Man shall be Condemned to die by the Mouth of one Witness, but by two or three Witnesses he shall suffer*; I think this is positive enough. I shall not trouble you with more Instances, though I could repeat several.

Sir, the Law injoyns Forms strictly, even to the least Circumstance; if a Man be Condemned to die, and after he is Condemned to die, another without Authority take away the Life of that Man, 'tis Murder. I will go further, if a Man be Condemned to be Hanged, Drawn and Quartered, if the Officer that is to do Execution, Shoot him, it is Murder in him; so that Men are not left to a Discretionary Power to Act according to their Consciences.

I take the Reason by which this Bill is supported, to be destructive to all Humane Society; for if that be

be admitted, that a Man shall Act according to his Conscience, and not according to the Rules that are prescribed him, I know not who is safe ; for how can an Innocent Man make his Defence upon that Principle ? It is a safe Consideration for them that take upon them that way of Judging, because they are bound by no Rules, but what hath not that done almost within Memory ? *Felton*, that killed the Duke of *Buckingham*, what was his Justification, but he was perswaded in Conscience he did well in so doing ? *Raviliac*, that killed *H. 4.* in *France*, he justified the same by his Conscience, and that he had done a good thing ; and I may say, this Argument of Conscience hath Acted all the Villany of the last Age, and I am afraid hath gone a great way to disturb the Happiness of this.

For if this be a Rule to this House, How is the King bound ? I thought he had been bound by Law ; but if this shall be admitted as an Argument, 'tis enough to say, if this House be Arbitrary, the King is. I do not reflect upon this Reign ; but it will be enough to say, though he act against Law, and turn Twenty Colledges out of Doors, his Conscience perswaded him to it. We see how unbounded the Liberty the Lords take, is, they are become Masters of all our Estates ; and I would be very loath for my Estate to depend upon the feeble Tenure of a Lord's Conscience,

If then, this be the Case, as it is according to this Method, I desire to know into what Condition we shall bring our selves ?

You have been told, it is expected from you by your Country, that you should Exert this Authority and Power : Sir, I would have been glad that in Cases more reasonable, we had Exerted the Authority and Power of Parliament ; I wish it had gone to the preventing the debasing and abusing your Coin ; I wish it would be Exerted, that we might not see our selves Cheated under Countenance of an Act of Parliament ;
but

but contrary to that, you are fond of being sprinkled with the Blood of Sir *John Fenwick*. As long as the Government is not in danger, I believe the Country would be glad that their Blood might run secure in their Veins, and not be tapt upon every occasion to serve a Turn; for if you break the Laws, what Man can promise himself Security?

We know the Consequence, if this Bill does not pass, Sir *John Fenwick* may live in Misery all his Time.

But what this Precedent may make, no Man can foresee. This Bill is against the Law of God, against the Law of the Land; it does Contribute to the Subversion of our Constitution, and to the Subversion of all Government; for if there be Rules to be observed in all Governments, and no Government can be without them, if you subvert those Rules, you destroy the Government. And therefore for these Considerations nobody will think it strange, if I give my Negative to this Bill.

Mr. Chanc. of Excheq. Sir, the Gentleman that spake last, hath carried the Reason against this Bill a little further than some others; for it seems now, we are not to reject the Bill for want of one Witness that is Legal in *Westminster-Hall*, but it seems there is no Evidence at all; and by Capt. *Porter's* not being Pardoned, and yet *dredging* for his Pardon, as to all that have been Condemned upon his Testimony, he hath Arraigned the Evidence as not sufficient, and hopes that will be the Judgment of the House upon this Bill. I think if the House reject this Bill upon that Argument, it will go further than many mean that oppose it.

Another thing he says; he compares the Convictions that I have upon my Judgment, and of every body else who speak from the Proofs that are made, that he is Guilty to the Whimsies of two or three Mad Men, whereas we go according to the Evidence brought at the Bar. We don't go upon the Whimsies

of

of *Raviliack* or *Felton*, but upon the Proofs that have been made here, and though there are not two Witnesses, yet upon what appears in Proof, I am convinced that he is Guilty ; and upon that Conviction, I think, according to the Duty I owe my Country, and the Constitution of *England*, when a Bill does come to punish the Man whom I think Guilty, I think I ought to be for the Bill. As to what is said out of *Deuteronomy*, That the Law of God was against it, if you will Argue *a Fortiori*, 'tis literally true, in the Case of Murther ; but whether Murther or Treason, there is the Life of a Man concerned, and 'tis not the Punishment whether to be Hanged, or Hanged, Drawn, and Quartered, that makes any great difference ; and give me leave to say, if you go to make Precedents from the Jewish Law, then I say, the Law of *England* is against that Law, in Case of Murther ; and by the same Reason you may desire leave to bring in a Bill to Repeal all those Laws.

Sir, if this was the Eternal Law of God and Man, where was this Eternal Law in *England* before *Ed. 6.* Time ? If it be the Eternal Law that there must be two Witnesses, Why does it not hold in *England* even in some Cases of Treason to this Day, I mean the Treason of Clipping and Coining ? So that the Nature of these Faults are what the Law of every Country Ordains, and that is the Law.

And the way of Evidence and Proof too differs in every Country ; and I may affirm, That there never was any Government in which there was not a Power lodged somewhere to be Exerted upon Extraordinary Occasions, beyond the Common way of Prosecution.

I don't care to Travel into the several Countries to see how their Constitution is, but I believe there is not one Place in *Europe* in which it is strictly necessary there should be two Witnesses to take away the Life of a Man, but it is generally so as it is here in all Ordinary Cases ; but in this Case, this last Law does
not

not go upon two Witnesses, for you have a Proviso in it does absolutely except Proceedings in Parliament. I do not infer from thence, that you should not have two Witnesses, if you proceed by way of Impeachment, I think you ought, and so for having Witnesses upon Oath, &c. When these Proceedings are in Parliament there is a direct Proviso by which the Parliament is Exempted from those Rules. Upon the whole Matter, I think this Man is Guilty. I think the Precedent would be more fatal, to say, that a Parliament can't proceed in such a Case, than that a Guilty Man should Suffer. I think this Bill comes before you with more Circumstances, and Reason to justify it, than any that hath been brought here before. Here is a Bill found against him by his Country, the Evidence of his Friends having tampered with one of the Witnesses, confirmed by a Jury, &c.

A Learned Gentleman says, he would come up to make this Paper Evidence (but can't come up to make such a Law) by which every other Man that is concerned in that Deposition would be affected; but here is something particular in this Case, a Man that hath been abroad, and hath not used the like Artifice, I think you ought not to use the like Power to Punish him that is not Guilty of the like Crime. And therefore I shall conclude. But I must take notice of one thing, it was said, that this was the first Precedent of this kind begun in this House, but that of the Duke of *Monmouth*; but I believe, if this Bill of Attainder is not to be begun in this House, 'tis not to be brought in at all; for I believe there is a Statute, That the Life of a Commoner is never to be meddled with by the Lords Originally. I will not trouble you any further, I do in my Conscience think that Sir *John Fenwick* is Guilty, and therefore I am for this Bill.

Mr. Pelham. I did not think to have troubled you this Day, I did rather intend to have left it to others that can speak better, or have not spoken upon this Subject; but that which hath been mentioned by
several,

several, is, as if they did think that we who mentioned the Law of God upon this occasion, did it as if we did think the Law of God was binding to you at this Day ; I never thought any such thing otherwise than as to the Morality of it, so far forth as it is grounded upon Reason and Justice, and tends to the clearing of an Innocent Man, and so far we and all Mankind are bound by it ; and that Law having been afterwards confirmed in the *New Testament* by our Saviour and the Apostles, at least approved of by them ; and this having been confirmed by the Law of *England* likewise, I do not think this a fit occasion for you to pass by so Fundamental a Law as that is : And I conclude with this, That I can't satisfy my self in my Conscience, and should think some misfortune might follow me and my Posterity, if I passed Sentence upon Sir *John Fenwick's* Life, upon less Evidence than the Law of *England* requires.

Sir H. Crofts. I shall endeavour as much as I can, to give you little trouble in this Matter ; but because it hath been hinted and remarked so particularly upon me, I must beg leave to discharge my Duty as well as my Conscience, as to what I said here the other Day.

Sir, I do very much forget my self, if I did assert that there was no such place in Scripture that required two Witnesses ; the thing that I said, was this, That if any Gentleman could shew me any Rule from Scripture that required two Witnesses more in the Case of Treason than in the Case of Murther or Felony, I should be glad to see it. I do say, that the Scripture shall be a Rule to me, as far as the Scripture requires ; but I do take the Jewish Law not to be so absolutely literally binding upon us here. And as to the Text out of *Numbers*, that very Text of Scripture is particularly and literally applicable to Murther ; and if that be binding now, we have been very much misguided by our Predecessors, and think we are bound to take it in hand, to Repeal all Laws that are against it.

Sir,

Sir, he is pleased to deny us, in some measure, the liberty of being guided by our Consciences ; truly, I don't know what he would have Gentlemen go by ; let him go by what Rule he pleases, I will go by the Rule of my Conscience, and will not do any thing against it upon any Consideration or Consequence whatsoever ; nor will part from the Liberty and Power of Parliaments, for any Rule or Law of Inferiour Courts whatsoever.

Sir, you are told, you ought to be guided by the Rules of Law, that is not the Forms of Law, but the Rules of Law. Sir, I say, if these Rules were made to bind Parliaments, it was reasonable they should be bound by them ; but if they were made only to bind Inferiour Courts, they are far enough from being intended to put a Cramp upon the Proceedings of Parliament ; and if you shall once subject your selves to them, you give the Lawyers such a Power, that I don't doubt, but their Books will be of greater Authority than your Journals ; therefore, in Consideration of that, and because I would leave that which is the Right of Parliaments to my Successors, I shall not submit to that.

Therefore, I say, I come clearly to the Point, whether Sir *John Fenwick* be Guilty or not. Only I must observe a little back, That as to those Instances that the Worthy Member was pleased to make use of, of *Raviliack*, and of *Felton*, shall those Extraordinary Cases that which Men did in heat of Blood, and private Malice, shall these be brought to bear a Parallel with what is done in Parliament for the Justice of the Nation ? I don't doubt but there are Men enough, in their Consciences, at least with pretence of it, will justify the Destruction of your Government and Religion, and every thing else, All those Men that deny the Right of your Government, have Conscience and Justice enough to subvert it if they could ; and therefore I do not so much wonder, that many Men without Doors have argued in that Nature.

But

But I say, my Conscience is the Rule I must go by ; and to me the Question is, only whether Sir *John Fenwick* be Guilty, or not Guilty, and I am called to give my Judgment in it, and I think I am bound by the Law of Nature, by the Law of the Nation, and I see nothing in the Law of God that prohibits me to give my Judgment according to the Evidence, and the Opinion I have in my Conscience of the Truth of it.

If there be no such Rule that requires two Witnesses binding upon me, if I may go upon one Witness, if I believe he speaks true, and that the Person is Guilty, then I am bound to act for the Preservation of the Nation, and all our Posterity : They that made this Attempt, made it upon you and your Posterity for ever ; 'tis not so small a Matter as some represent it ; 'tis not the Person so much as the Nature of the Fact we are to consider ; and we are not to let Men escape Punishment according to their greatness or their smallness, but according to the Nature of the Fact, and their Guilt. I think I have that freedom, and I am so little bound by those Rules that have been urged, that if both Witnesses were here, and gave Testimony against him, if I did not believe him to be Guilty, I would lose my Life rather than Vote him so ; but on the contrary, if here be sufficient Evidence to convince me, though not according to the Rules of Inferiour Courts, I will not subject the Freedom of Parliaments to those Rules.

Sir, you have been told formerly, and I think it a Matter of that weight, I beg leave to urge it again, because 'tis a great Reason that guides me in this Matter, if you lay it down for a Doctrine in this House (for a Resolution here taken, is as much a Rule as a Law, for it shall be brought as a Precedent, and therefore if it shall be laid down as a Rule here,) That you will never Attaint any Man, or find him Guilty, but upon two Witnesses, I think the Government, and all you have, stands upon a tottering Foundation :

He

He must be a very ordinary Statesman that can't lay his Plot, so, as you shan't reach him by two Witnesses.

Therefore I say, I think it becomes the Wisdom of Parliament, not to declare themselves bound in that respect; I would have them bound by Justice, but not by the common Rules of the Law.

Sir Rob. Cotton. Sir, I do find that Gentlemen do very much insist in this Case, That if a Gentleman does believe that *Sir John Fenwick* is Guilty, he must give his Vote for the passing of this Bill; if that be so, I am glad that Opinion did not take place in the last Reign, if it had, I am of Opinion I should not have been here now; and I believe my Lord *Warrington*, who was very Instrumental in promoting this Revolution, would not have died in his Bed. My Lord and I were accused of a Crime, which I believe, if proved by two Witnesses, had been Treason: I have heard some Gentlemen say in this House, they did believe my Lord *Warrington* was Guilty (though he was not Guilty of the Fact as it was laid.) There was a Man sworn, &c. and there was some corroborating Evidence; but as to Mr. *Offley* and myself, there was none but this particular Person, and they Indicted us of Misdemeanor, though it would have been Treason, if there had been two Witnesses: Now if the same Fact was Treason when proved by two Witnesses, and but Misdemeanor when proved by one, methinks we are doing an Extraordinary Thing: We are going after the Fact committed, to make that which is but a Misdemeanor, to be Treason. And for these and other Reasons, I can't agree to the passing of this Bill.

Id. Norreys. Sir, though I had always an Apprehension of the ill Consequences, of this Bill, yet never so much as now; for this Gentleman hath given Arguments that shake me more than all that I have heard before; for he says, there are a great many Men, if they may proceed according to their Consciences, will

will Subvert this Government, and bring in King James and Arbitrary Power; and he tells you, That every Precedent in this House, is equal to a Law, and will justify the like for the future. I am sure I am very unwilling to make a Precedent that shall justify Men in such ill Actions, in saying, their Consciences prompted them to it.

Then a Question was put for bringing in of Candles, which passed in the Affirmative, and they were brought in.

Mr. Hamond. Mr. Speaker, I don't think the Power of Parliaments in question in this Case; but then, as all other Powers, it must be founded upon Justice, and never used but upon Extraordinary Occasions, and when Criminals are not to be met with otherwise. The Power of Parliament is not lessened if this Bill does not pass: But the Question is, Whether this Power should be Exerted in this Case? What Gentlemen say of being guided by Conscience, hath no weight with me, further than that is governed by the Law of the Land. If it be to be admitted in the Case of Life and Blood, why not in *Meum & Tuum*? Why was he brought to the Bar then, if according to our private Judgment we are to determine this Matter? No Man thought but he was Guilty.

I beg leave to mention one thing that is come to my Knowledge. After the Tryal and Condemnation of Mr. Cook, I had an Order sent me, that I might see him, and I went to him by Verture of that Order, and the greatest part of the time I spent with him, he took up in declaring against the Evidence of Goodman, and that he would Receive the Sacrament upon it, and give it in Writing, as his dying Words. I saw also three Witnesses confront him at his Tryal, and when I heard him say this, it weighed so much with me, that I have very great ground of Suspicion, That Goodman was Perjured in the Case of Cook.

Here hath been Popular Expressions of Plots, and Jacobites, that no Man can apply to this Particular Case,

Case, or say, this is a Case wherein we ought to use this Extraordinary Power. He was in the Hands of the Law, and no body can say, that the Government must sink, if he does not die. If we go from the Rules of Justice, I believe it will give a great blow to the Government.

Mr. Vernon. Sir, I rise up only upon what that Worthy Gentleman hath offered unto you ; for I did not think to trouble you with any thing of that Nature. But if you will give me leave to acquaint you with what I believe, who have been later with him than this Gentleman, and much oftner. Sir, he does tell you, that he is very far from denying what hath been sworn against Sir *John Fenwick* and himself, concerning the Consultation to bring over the *French*, for he hath a very particular remembrance of it, and if that Gentleman was to speak with him now, he would satisfy him, I believe in that Point : And since I am up, I think every Man that speaks upon this Occasion, should likewise give some Account of himself, in what Manner, and for what Reason he discharges his Conscience here ; I hope I may use that Word, since Gentlemen make use of Conscience for his Acquittal, and a Man ought to have a very good Conscience for his Condemnation.

As to Sir *John Fenwick's* Innocence, I wish he had given no Occasion to have it called in Question ; and since he did fall under this Accusation, I wish he or his Counsel for him, would have taken some pains to have made his Innocency appear ; but I don't find the Question is, Whether Sir *John Fenwick* is Guilty, but whether there be any Evidence of his Guilt ? And I shall tell you, in short, my Opinion of that. I take the Proof of the Fact to be in general, such a Demonstration as the Nature of the Thing is capable of, and that is sufficient to convince a Reasonable, Honest, Unprejudiced Man, of the Truth of what is Asserted, when there is no manner of doubt left, whether it is so or no, nor the appearance of any possibility,

possibility, that it could be otherwise. I think there hath been that Proof in this Case, and nothing attempted to disprove it, and nothing hath been proved on Sir *John Fenwick's* Behalf, that any wrong hath been done him. And therefore, in short, my Sense of it is, That whereas some Gentlemen think him Guilty, but the Matter not proved; I think him guilty, because 'tis proved, and there hath been no offer made to disprove it.

Mr. Bromley, Warr. Some Gentlemen have spoke of the Power of Parliaments, but I shall say nothing to their Power, which I have learned from my Lord *Coke*, is so Transcendent and Absolute, that it can't be confined within any Bounds: But the more Just and Honourable it ought to be in its Proceedings, to give an Example to inferiour Courts; and though their Power can't be deny'd, yet the Exercise of it hath been often Censured and Condemned; and Acts that have passed in one Parliament, have been in the same Reign Repealed, and sometimes severely Branded; *Id possumus, quod jure possumus.* 'Tis certain here is a defect of Legal Evidence: We are not tyed here to the Forms of *Westminster-Hall*, but certainly, with Submission, we ought to tie our selves up to the Rules of *Westminster-Hall*, especially when they are founded upon Common Justice, which is the same, is not *Mutable*, and ought to be *Universal*

By the Law of the Land, no Person is to be Convicted in Cases of Treason, but upon two Witnesses; the Law of God is the same. However, if you will pass this Bill, all Persons must acquiesce, and there is no disputing of your Power afterwards. It hath been an Argument used to Day, That the Security of the Government requires the passing of this Bill, which I think to be a good one too, if they can make it appear, that unless you proceed in this way, the Government is in Danger, though I must observe, it was not that Consideration, but the Vindication of an Honourable

nourable Person's Reputation, that brought this Matter first before you.

It does not appear to me, That Sir *John Fenwick's* Life or Death can endanger the Government. You have been told, of a Design that he hath been Engaged in, as is carried on at this time, That an Invasion from *France* seems to threaten us: The former Design hath been happily Discovered and Defeated, and 'tis not probable that Sir *John Fenwick* should have any great share in any that is carrying on at present: And as far as I can learn, he is not so considerable a Man in his own Person or Interest, that we need fear him.

An Honourable Person said, if we do not pass this Bill, they that sent us here, would give us no Thanks: 'Tis not a good way of Arguing; but I believe, if those look forward, they will thank us. Sir, in the Act for Declaring the Rights and Liberties of the People, you have said, *That the late King James, by the assistance of divers Evil Counsellors, &c.* How comes it to pass, that we have never Attainted any of them? And if we are for proceeding in this way of Attainder, because it pleases them that sent us hither, I dare say, the Attainting one of those Men, would gratifie those that sent us hither, more than the Attainting Twenty such as Sir *John Fenwick*. It was pretty well known what share some Gentlemen had in bringing in of Popery and Arbitrary Power; and I will take the Liberty to say, That there is never a Gentleman in this House, but believes them to be the worst of Criminals.

Upon the whole Matter, I do not think you have any occasion to Exert a Power, that no body denies; I see no Security this will be to the Government, and consequently, no necessity of it: I think you are making a most dangerous Precedent, and that it will be of ill Consequence to you, and therefore I am against this Bill.

Mr. Smith.

Mr. Smith. Sir, I will be as short as I can, and if it had not been for something in this Day's Debate, I should not have troubled you. As to what was said by the Gentleman that spake last, of making Examples of some that had been Criminal in the last Reign, how that came to happen, that no such Examples were made, I shall not now entertain you, but I believe most of the Gentlemen in the House know pretty well.

But I take the Matter before you, is what Evidence you have to prove Sir *John Fenwick* to be Guilty, and whether there be not an Extraordinary Occasion at this time, to Exert the Legislative Power ?

I shall not enter into the Matter of Precedents, those are out of my Province, but I have read some ; however, it shall not pass upon me for a Rule, because some Bills have been Reversed, no others shall be brought in ; it is possible that the Reversing of them, may be worse than the first bringing of them in.

But to apply my self to the Evidence, I can't but observe one thing that seems this Day Extraordinary : We are told by some Gentlemen, they are against our Proceeding upon this Bill, because it does not *quadrare* to the Rules of *Westminster-Hall*, and at the same time, Gentlemen take Liberty to make Exceptions here against that Evidence that *Westminster-Hall* has allowed : And it seems hard when they Argue from *Westminster-Hall*, that they should take Exceptions to that Evidence which the Law of *England* allows to be good. For it is notorious, it hath been admitted in *Westminster-Hall* ; And Gentlemen might have as well have told you, That those Men that Suffered, died Innocent, as to have denied it ; and I think there is a further strengthening of his Evidence, for there is not one Man, who hath died upon his Evidence, but hath acknowledged himself Guilty of what he hath Charged him with.

As to the Matter of the other Evidence, Sir, I do not say that it is Evidence that will come into *West-*

minster-Hall ; but at the same time, give me leave to tell you, They seem to lay a little stress upon it, when they tell you, they believe it was false Evidence ; and instance in what *Cook* said to a Gentleman of this House, after his Condemnation ; but I think thus far I may say, That when you sent some of your Members to Examine Sir *John Friend*, he did own all those Persons to be at that Place, and that is a much better Argument for the Validity of *Goodman's* Testimony. But as to the Matter before you, some Gentlemen have made it a Question, Whether Sir *John Fenwick* be so considerable a Man, as you should Proceed in this Extraordinary Manner with ? Though they all say, you may do it, yet at the same time they tell you, this was never put in Execution, but they were in the wrong that did it.

Now, Sir, the Question is, Whether you should make use of this Power at this time ? Say some, The Plot is over, I wish it was : But when a Conspiracy hath been laid so deep and general as this was, 'tis not the Hanging of one or two that will make us safe. When 'tis apparent to you, here is all the Artifice in the World, all the Endeavours in the World, by Sir *John Fenwick's* Friends, to remove *Goodman* out of the way, 'tis some Argument that he had something to say to him : And when we see Prisons broke open daily, and we have known Persons Murdered in the Streets for giving Evidence, (very notorious is the Case of *Dodsworth*) you have Plots all about you, and yet can you think there is no occasion to make use of this Extraordinary Power ?

I would have as great a Conviction upon my Conscience as I could, but 'tis very hard a Man must throw his Conscience aside in the Case. 'Tis very hard to believe, That if there be two Witnesses produced, though I don't believe the Witnesses, yet I am safe if I Condemn the Man ; and if there be but one Witness, I am to acquit the Man, though I believe him to be Guilty.

And

And though they go to Scripture, to tell you there must be two Witnesses, yet they don't go so far as to tell you there have been very Extraordinary Things done, even by God himself for the preserving a Community.

And where is the Reason of it, that one Witness may take away a Man's Life in one Case, and not in another? There was a Thing said, that was one thing that occasioned my standing up: A Gentleman said, truly, it seemed to him to be a better way to put an End to the Plot, to have an Act of Indemnity, than the Conviction of Sir *John Fenwick* would be. Sir, there seems very little Reason for Acts of Indemnity, when we have seen an Act passed so lately, which has not restrain'd Persons, nor brought them to a Sense of their Duty; and we have heard Persons own at your Bar, That the Fact was committed just after the Act of Indemnity. Sir, I do heartily, according to my Conscience, Vote for this Bill.

Mr. Harcourt. Sir, I am sensible 'tis very difficult to say any thing, and not seem tedious at this time of Night; but I take it to be my Duty not to be silent in this Matter.

All the Arguments that I remember have been made use of in any former Debate, or in this Day's, may be reduced, in short to these two Heads; the danger of the Government, and Gentlemens private Opinion.

Sir, as to the Danger of the Government, if any body will Convince me there is such danger, (I promise him, if it be worth his time so to do) I will be his Proselite, and Vote for this Bill: But, to tell me the Government is in Danger, and the Fate of *England* and *Europe* depends upon this Bill, is certainly rather offered to Amuse, than to Convince.

It hath been asked, Can the Circumstances that Sir *John Fenwick* is in admit of any Danger to the Government, which hath Power over his Liberty every day, and may restrain him of his Liberty during

his Life ? A Man, by the Account I have had of him, of little Interest, not worth Nine Pence. (I have no Acquaintance with him, and so I may easily mistake his Circumstances.) But, Sir, whatever his Circumstances are, he is in safe Custody, and no doubt there he will be kept ; and to say the Government is in danger by such a Man, sure, that can't be thought by any Man living : And God forbid this should be the Case of the Government, that it can't support it self without taking away this unfortunate Gentleman's Life, contrary to the Rules of Law.

For the Argument of private Opinion, 'tis almost as dangerous as the Precedent you are making. I will not urge it from the Case of the People called *Enthusiasts* and Madmen ; but I will urge it in the Case of Men that sit in Judgment, if Opinion is to justify the Condemning of a Man, let us never more call the Verdicts against Mr. *Cornish*, Mr. *Sidney*, Lord *Russel*, and others, Murthers. Ask the Jury, no doubt none of them are so silly, but will tell you, in his Opinion they were Guilty ; but if Opinion may Condemn a Man without Proof, Why not Acquit him as well where there is a plain undeniable Proof ? Such a Practice, I am sure, would never be endured.

The properest Method, I think, was proposed by the Gentleman that began the Debate ; and I beg leave to follow the same steps, to consider his Guilt, How it appears to us, and whether there be any Reason for this Extraordinary Manner of Proceeding.

The Recital of the Bill are the Arguments for it ; and those we send up to the House of Lords, for the Passing of this Bill : And first, it says, That Sir *John Fennick* was Indicted by the Testimony of *Porter* and *Goodman*, &c. It says, that several Days were appointed for his Tryal, and at one of those Days the Tryal had come on, if it had not been for the Discovery that he pretended to make ; but it does not say, it was put off at any other Days or Times, for that Reason : But it goes on, and says, he hath made
several

several Reflections, &c. instead of making an Ingenious Discovery ; and then it recites how that *Goodman* is withdrawn.

I would beg leave to put Gentlemen in mind of what was a great Inducement to bring this Bill in. It was said, That Sir *John Fenwick*, and his Relations had done it ; That they would prove that *Goodman* was withdrawn by his Means. Give me leave to say, the Bill does not so much as recite that, and I beg leave to say, That there was no Proof of it, unless the Hearsay of *Clancy*, and the Actions of my Lady *Fenwick* are to be Evidence, contrary to the known Laws of *England*, to affect this unhappy Gentleman in the Case of his Life. I say, if any Gentleman had been of another Opinion, no doubt, he would have offered that Amendment to the Committee.

As to the Discovery that Sir *John Fenwick* hath made, it does not appear to me, whether it be true or false : It is one thing to give a Vote to clear a Gentleman's Reputation, and another thing to carry it so far to give Judgment That the Person that made those Reflections shall die, and that before any Proof of their Falseness.

Here is an Indictment found, and here is an Evidence withdrawn, that is all I am satisfied in : And supposing the Person Guilty, it is no manner of inducement from these Arguments, to proceed in this Extraordinary manner.

But I would consider the Matter of the Amendment made at the Committee (Of which Treasons be the said Sir *John Fenwick* is Guilty.) I can't say that ; and therefore I can't Vote for the Bill. If he be Guilty, it does not appear so by Legal Evidence, and therefore, if I am to Judge him, he appears to me as an Innocent Man. The Law requires two Witnesses to Convict a Man of this Crime. 'Tis the greatest Crime, and the Law is so merciful, that it won't expose a Man to such great Penalties, without demonstrative Evidence.

The

The first Act of Parliament that requires two Witnesses, is, 1 *Edw. 6.* The next is, 5 *Edw. 6.* And upon that Act, give me leave to take Notice: That Act goes a little further than the First; for the 5 *Edw. 6.* does not only say, *There shall be two Witnesses,* but it goes on, and says: — *which two Witnesses* (they are there called Accusers, but mean the same thing) *shall be produced in Person before the Party at his Arraignment, and shall there, before his Face, Maintain, and Avow what they have to say.* So the Parliament particularly provided, That there should not only be two Witnesses, but that they should appear in proper Person, in open Court.

I beg leave to observe, That after the making of the first Act, in the second or third Year of *Edw. 6.* there was an Attainder of Sir *Tho. Seymour*, in Parliament, without Hearing of him; and that very self-same Parliament, within two Years afterwards, seems so to have repented of that Matter, that they made that Provision I have mentioned, in the 5 *Edw. 6.* And to secure, That that ill Precedent should do no harm, they put in that Clause. If this Act passe, I wish we do not repent it in less Time than that Parliament did the Attainder of Sir *Tho. Seymour*. Let us be guided by the Reason, the Justice, and the Discretion of that Act, though we are not bound in our Legislative Capacity, by the Power of it. I can't but observe, that from the making of that Act, no Person has been Attainted in any other manner, till the Duke of *Monmouth*. So great a Veneration has that Law always had in all Reigns, though multitudes of Conspiracies have happened in them all, I do not think it so material that there should be two Witnesses, as that these Witnesses should be heard Face to Face, and Cross-examined. It hath been told you, That 'tis Natural Justice and Reason, that there should be two Witnesses, A Gentleman asked you, where that Natural Justice was before the Statute of *Edw. 6.*? Sir, the Statute of 25 *Edw. 3.* says, That every Person that

that is Attainted, *shall be provablement Attaint*; and somewhat may be from thence inferr'd more than that the Crime should be prov'd, for so must every Crime. But as to the Proof required by that Act, and the Acts of *Ed. 6.* All those Acts, by very learned Opinions, have been thought Declarative of the Common Law; but that's scarce worth the Enquiry, since 'tis certain how the Law stands at this Day.

An Honourable Gentleman took notice, That such Evidence as we have had, and such Proceedings as these, would not be reasonable in Case of an Impeachment, but distinguished between that Proceeding and this; but certain, the Reason is the same: 'Tis true, the same Persons that accuse in one Case, give their Judgment in the other, but in each Case such Priviledges as are just and reasonable ought to be allowed to the Party accused.

I shall add no more, but that we are making a Precedent which can't be made without breaking through all the Fences of the Law, and when 'tis made, we know not who may suffer by it.

Sir Rich. Temple. As to the Evidence you have before you, I appeal to any Man, whether at the Common Law, if there was but one Witness against a Man, Whether he was not at Liberty of demanding Tryal by Battle? Those Acts that have been made since, are made certainly to provide, That in no Case whatsoever, a Man should be so much as accused without two Witnesses of the Treason.

As to what hath been said of the particular Evidence before you, what hath been observed here, is a good Objection in the Courts below: I do not say it does disable a Man from being an Evidence, because he is not Pardoned, but he is not so good an Evidence as if he was pardoned. But that I stand upon is this; Shall you come here and make a Precedent in this Place to condemn a Man to the highest Penalties, upon less Evidence than you will allow any body else to do it? That is what was never done in Parliament before.

fore. Will you make a Precedent in Parliament, that at any time they may bring in a Bill here, and judge a Man to Death for Treason upon one Evidence?

As to this Bill it self, consider what a Precedent you will make. There is nothing that any Bill was condemned for in Parliament, that is not in this Bill. All Mankind must perceive, That you have but one Evidence, and such a one as I have told you. And whatever any Man's private Persuasion is, 'tis the Proof must govern you. Then this is a Law, *ex post facto*, and that hath been always condemned, you make that Evidence that was not so before. Sir, this is besides making a Law in a particular Case, against the Common Law of *England*, and the Right that every Subject has. It is making a Law to hang a Man without a Tryal; 'tis making a Law here, that was introduced upon a Pretence to make him an Evidence: Every one said, That they did not seek his Blood, and if that be the Secret inducement in this Case, 'tis a dangerous Precedent. The Earl of *Exeter*, when he brought the Rack into the *Tower*, every body knows the Fate that came upon him afterwards.

Let any one Body shew me there was any Reason for reversing any Act of Parliament, they are all against this Bill.

Then to the necessity of it, I can't imagine any thing that hath been said to you upon that, is a ground for this Bill. Pray consider first, how this Matter came before you, it was for an Honourable Person's Vindication, and it was not transmitted to you by the King. but by the Honourable Secretary: He told you, That if you had a mind to see these Papers, and required it, he had leave to let you have them; but if it had been a thing of this Consequence, That the Government had been in the utmost Danger, Would it have been transmitted only at the Request of a Private Gentleman, and left unto you, whether you would proceed upon it or no?

But

But 'tis observed, That the Plot may go on still, Pray if this Gentleman be cut off, does that cure it? You are secure of him now, that he can't act in it; so that I have not heard the least ground to convince me, That the Government would be in less Danger, if this Gentleman was cut off.

Sir, we are told here of going according to our Consciences; give me leave to say to you what was instanced in the other Day, That in the worst of Times, when they did not stick at murdering of the King, yet they stuck at this. They would not allow any Man to suffer upon one Witness: And they did not admit of Depositions against my Lord *Mordent*, and my Lord *Mordent* saved his Life by it.

You have deposed King *James* for breaking in upon the Law. Did any body believe that Mr. *Hampden* was not Guilty of the Treason he was charged with? He owned it before this House, and yet he was tryed only for Misdemeanour, there being but one Witness against him, and they that strained all other Laws, stuck at this, and would not violate this Law. So that I think there is no necessity for making such a Precedent, and I think it would be the worst of Precedents.

Mr. Boscorven. I have observed upon this Debate, That some Persons deny that 'tis justifiable at any time, to proceed upon Bills of Attainder, and yet they don't dispute the Power of Parliaments, but at the same time say, they ought to go according to the Rules of *Westminster-Hall*.

Another says, 'tis the same thing whether we Proceed by way of Impeachment, or Bill of Attainder, I think him much out of the way, for in that Case, the Lords only are Judges, and you are the Prosecutors, and you don't use your Legislative Power in that.

A Worthy Friend of mine said, He had often been mistaken in his own Conscience, when he thought himself very much in the Right. That might be so,
and

and if there was any room rationally to suppose, That Sir *John Fenwick* was not Guilty, I should be of Opinion to be of the more favourable side, but I take it, there is no room for any Man to believe but he is Guilty.

Now I would examin what grounds we have to believe him Guilty. Upon Tryals, when they charge a Jury with a Prisoner, one part of their Charge is to enquire, whether he fled for it or no? 'Tis notorious, that Sir *John Fenwick* fled for this, which is no small Argument of his Guilt. Another is, That he was here at the Bar, and did not deny the Fact. If he had confessed it, no doubt but you would have concluded him Guilty, and when he does not deny it, this is next Door to it.

It hath been told you, many Bills of Attainder have been reversed as Unjust ; it hath been as notorious, That the Verdicts of Twelve Men, and when Men have been tryed by their Peers, have been reversed too ; I will Instance in two or three. The first I begin with, was that of the Duke of *Somerset*, but no Body could say, but he was Guilty of the Fact, for he confessed it ; but there was a powerful Enemy, the Duke of *Northumberland*. The next is, the Duke of *Norfolk*, who was Attainted in Queen *Elizabeth's* Time ; and they were not by Parliament, and yet both were reversed. And I think, as this Matter stands now, some Gentleman are of Opinion, by the Evidence they have heard, That he is Guilty ; but I think no body hath said, That it appears to him by the Evidence he hath heard, That he is Innocent. Now I desire to know, whether every Man must not use his Conscience to judge, whether there be sufficient Evidence ? I acknowledge there is not sufficient Evidence to Convict him in *Westminster-Hall*, but there is more to satisfy my Conscience, and the World abroad, than if *Goodman* was here ; besides his not denying it, you have the Evidence of the Persons that died, who owned the same Thing :
And

And I mention that, the rather, because they confessed it to Persons sent from this House, and did not only confess themselves to be Guilty, but acknowledged, That there was such a Conspiracy: And Sir *William Perkins* acknowledged in particular, That he was to raise a Troop of Horse, and that the French were to be invited over. Is this nothing? Is not this to be taken notice of by the Legislative Power, that is to secure the Peace and Welfare of the Government?

Gentlemen say, there is a great deal of Danger in this Matter; Some, if you acquit him; others, if you condemn him. If you are satisfied he is Guilty, by this Bill, you set up a Land-Mark, that others may take care they do not come into this Predicament. On the other Hand, if you reject this Bill, you will give Advantage to your Enemies, when they shall see a Man that is so notoriously concerned in calling in a French Army, the worst of your Enemies to be Score-free. If he be Guilty, what Danger is there of the Precedent? When a Person is concerned in the like Nature, and hath fled for it, and does not deny it: When living Persons confess it, and dying Persons confirm it, then there will be danger to such a Person.

Upon the whole Matter, I think there is no Man that ever I heard, That does not believe him to be guilty; and 'tis strange you should want Evidence, and yet every one think him guilty; and I think no Man must be acquitted or condemned, but according to a Man's Conscience.

An Honourable Person said, *Porter* was no good Witness: If *Goodman* was here, he would not be so much, and yet 'tis argu'd we must acquit him, because *Goodman* is not here: And therefore, upon the whole, I think you will give your Enemies a great Advantage, if you acquit him; and if you condemn him you will do your selves Right.

Mr. Cowper.

Mr. Cowper. Sir, being concerned in Prosecutions of this Nature without Doors, I have hitherto declined concerning my self in any Debate upon this Evidence, as I have been wholly unconcerned in the Conduct of the Evidence against Sir *John Fenwick*; but being now to give my Opinion and Vote as a Judge, I shall crave leave to offer my Sense of this Matter.

In the first place, I would make use of a Distinction, which I think will serve to answer several of the Arguments, that have been used against the Bill in this Debate. I think there are two things to be considered, First, his Crime, and the Proof of that Crime, and then the other Matters done by him subsequent to his Accusation.

The Crime and Proof of it that hath been given against him at your Bar, are the Grounds by which I think my self justified before God and Man, in giving my Affirmative to this Bill, by which you adjudge him to die. What he hath done subsequent to his Crimes convinces me in my Judgment, That we are here in a very proper Method and Course of Proceeding against him: Therefore let no Man say on the one hand, that he is Condemned to die, because he hath by Artifice protracted the time appointed for his Tryal, till part of the Evidence is withdrawn. No, he is Condemned to die for having been Guilty of High Treason, manifestly proved against him at this Bar. Let them say on the other hand, Will you in this Method Condemn every Man that is at any time Guilty of High Treason? No; But take it together, when a Man plainly Guilty of the worst of Treasons, which would have been manifestly proved against him in the Ordinary Course of Proceedings, but for his own Contrivance and Artifice, When a Man, I say, by undertaking to atone for his Crime, and to make his Country Satisfaction, shall by that means protract the Time for his Tryal, till one of the Evidences is gone, When a Man, to delay his Tryal,

Tryal, shall pretend to have a Reserve, which he would make known to the King's Person only, and then when he thinks he is got out of the Ordinary reach of the Law, set the Justice of his Country at defiance. These are grounds, not why he is Condemned to die, for that is purely for his Treason, but to justify our selves in relation to our Proceeding against him in this manner.

Sir, in the next place, I would beg leave in a few words to take notice of some other things that have been said in this Debate: Gentlemen are afraid, that this Example will be made use of by Posterity, to the disadvantage of Honest Men; and you have been told, that Precedents have begun with the Punishment of the Guilty, and then have been carryed on to the Punishment of those that have been not so. 'Tis true, there hath been lately a very bad use made of Proceedings in the Ordinary Courts of Justice in relation to Publick Crimes. But what do Gentlemen infer from thence? Must we therefore have no such thing as Justice? Must not the Guilty be punished, because the same Methods have been, and may be made use of hereafter for the Punishing of Honest Men?

For my part, I am not afraid of what use Posterity will make of this Example, if there come such Times of Violence; alas, they will not want this Precedent, there are others which have been cited in this Debate, that will much more justify their Arbitrary Proceedings. Nay, this Example may rather serve to Protect the Innocent; for if a Bill of this Nature come hereafter to be proceeded upon in Parliament against another, he may alledge for himself, That Sir *John Fenwick* was heard Personally, and by his Counsel, That the Evidence was in that Case produced before him, and confronted with him, There was that Extraordinary in his Crime, which is not in mine; he would not only have introduced a Foreign Army, and in that committed Treason;

but afterwards aggravated his Crime of High Treason, by endeavouring, when he was in Custody, to abuse the King, and to create a Jealousie between the King and his Ministers.

Sir, in the next place it is said, That here is not a Legal Evidence, though there is an Evidence that really convinces Gentlemen in their Consciences (I am not ashamed you see to make use of that word) yet they are not for passing of this Bill, because, say they, there is not a Legal Evidence. With Submission, Sir, I think that is a mistake: Before the 1 *Ed. 6.* one Witness was good Evidence in High Treason; there was indeed a variety of Opinions touching Treasons before that Time, which that Statute was made to Remedy; but neither the first nor the fifth of *Ed. 6.* in the Penning or Wording of them, nor in the Reason of them, were intended to extend to the High Court of Parliament, nor can they extend to it in its Legislative Capacity. So that for ought that hath been said, though it should be admitted that one Witness, corroborated by Circumstances, and (as this Case is) the Confession of the Party, would not be Legal Evidence below; yet, with Submission, it is a Legal Evidence in Parliament, even according to the strict Rules of Law, because no Law hath made Witnesses requisite in this Place; nor could a former Parliament Enact what should be a Legal ground, and what not, for the passing a Bill in this. So that as it is a Convincing Evidence, I think it may, for that Reason, be justified to be a Legal Evidence here in Parliament: And as it Convinces me, so that I can't resist the belief of it, I must be upon that ground, for this Bill, notwithstanding what some Gentlemen have said by way of endeavouring to explode Conscience as a Rule not to walk by in this Case. One Instance given against it was (it seems) because a Hangman has not a Discretionary Power to Execute a Man according to his Conscience, and put him to what sort of Death he pleases; as if we had not a better

better, and more Legal Discretionary Power here in the High Court of Parliament, than the Common Hangman in the Execution of his Office.

But we are told of several Instances where Mad and Hair-brain'd Men have made use of Conscience to palliate their Extravagancies : No doubt it hath been so ; and let me tell you, Religion too hath been as often made use of for a Pretence to the worst of Villany in all Ages, and yet I hope they will not Argue from thence, that there ought to be no such thing as Religion neither, for a Guide to Mens Actions.

When Men are to be Judges, I would fain know what Rule they have better to walk by, than a sedate, and well-informed Conscience in the Courts below, when a Legal Evidence is given ? Yet the Jury are not bound to go by that Legal Evidence ; they are, when they have heard it, Judges of the Credibility of the Fact, and are at last to go by no other Rule than what has been so much ridiculed in this Debate, even the *Rule of their own Consciences*.

It was said pretty early in this Debate by a Member of great Reputation, That this (except *Monmouth's Case*) is the first Precedent of a Bill of Attainder that began in this House. It seems the Ancient way, was, for the Lords to give the Wirnesses their Oaths, and when they thought fit, they thereupon sent down a Bill, and the Commons were to proceed upon it : But I think, with Submission, this is a much better way ; and I had rather give my Consent upon hearing Convincing Evidence, and seeing that the Party has nothing to say for himself, than upon any Bill transmitted hither from the Lords, and no other Evidence before us, than that they thought fit to pass it.

Some Gentlemen have set a great weight upon this Argument : Say they, Sir *John Fenwick* is not a Man so considerable as to endanger the Government : I admit it, they that have spoke for the Bill, have not (as

* Here he
was inter-
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the Noise
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Gentlemen,
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that way of
Arguing.

I observe) made use of the contrary Arguments; but as to that, this is what I lay my Finger upon in particular. 'Tis plain he was to be General, and must know a great many of the Officers under him; and therefore I am satisfied he hath not made that Attonement to his injur'd Country that is in his Power, and that he ought to have done. And I am satisfied that unless this Bill proceed against him with the greatest steadiness, you will have none of that Discovery * — Don't let Gentlemen pervert this Argument, and say, Will you Hang a Man if he don't Confess? No; but when I have heard such Proof, that he is guilty of the worst of Treasons, and that he hath aggravated his Crime in the manner he has done, I think he deserves to die, unless he will merit his Life by a useful Discovery of what he cannot but know. And I think it of the highest Importance to you that can be, that you should come to the further Knowledge of the other Branch of the Conspiracy, the meeting and joyning with the French King's Forces in England. I think you are now in a proper Method to attain that Knowledge, and perhaps you may have a better Issue of this Bill than this Gentleman's Death; but if not, he will but pay that Debt which he manifestly owes to the Justice of his Country.

Mr. Pater. Sir, I can't believe but I shall be heard as to the little I have to say, with some uneasiness, after so long a Debate. But, Sir, since I did take the Liberty to give my Opinion, why I was against this Bill before; I think it as reasonable to give you my Reasons, why I don't stand convinced by the Arguments I have yet heard. And that I may the better give you my Reasons, I shall, as well as I can remember, repeat some of the Arguments that have been urged for the Passing of it.

If I mistake not, some of the Arguments have run upon the Power and Prerogative of Parliaments;
some

some upon what was proper Evidence in this High Court of Parliament, other than what would be in other Places ; others upon the Extraordinariness of the Occasion.

As to the first of these Arguments, since Gentlemen much more experienced in Rules of Parliament, do not think fit to deliver their private Opinion, what Rules Parliaments may in Reason be supposed to have, I shall not say any thing to that.

As to the Arguments of what Evidence shall be sufficient to adjudge a Man to Death in this House, I confess, I shall at all times be very careful, how I give my Opinion in Matters of Life and Death, because I think the greatest Caution is to be used in that Case. And for this Reason, I can't Consent to give my Opinion in one Case, that I shall think fit to retract in any Case afterwards.

If I understand the Meaning of the House, 'tis not in Favour to Sir *John Fenwick* himself, that Gentlemen oppose this Bill, but for fear of *Ushering* in a Precedent, that may be made use of against a better Man.

I confess, here is a Worthy Member that spake last, said something in his Argument that hath some weight with me. I did apprehend by the general Debate of the House, That the Parliament had no Rules at all, but what they would fix to themselves, but I have a great Regard for his Opinion. If he says true, the Evidence before you is not Legal Evidence in *Westminster-Hall*, but 'tis Legal Evidence according to the Rules of your Proceeding in the High Court of Parliament. But I think truly, if they may be presumed to have any Rules to go by, nothing is so plain to me, as that a Rule of their own of so late Date, as the Act for Regulating Tryals in Cases of Treason, should be a Rule to them : And 'tis said in that Act, *That after such a Day, no Person shall be brought to Tryal in any Case of Treason, &c. but he shall be Condemned upon the Evidence of two Witnesses ;* and I must needs say, that Act that was passed last Sessions, is so much for

the Liberty of the People of *England*, that I think it will be very hard to Repeal that Substantial part of the Law so soon after it was made.

As to the Extraordinariness of the Case, I am sensible what stress hath been laid on that Argument, as if the strength of this Government did in some measure depend upon your Disposal of this Matter one way or the other ; and since that is the Case, I shall speak tenderly of it ; for I do as much abhor Acts of Treason against the Government, as any Man that hath spoke for this Bill. I think, as the Crime is to be distinguished from all others, as being a more than Ordinary Crime, so I think, the Person that is Concerned, must be Extraordinary : And I think, with Submission, there is some difference between Principals and Seconds in an Act of Treason. When you can't come at a Man, being the Head of a Rebellion, it may be reasonable to proceed by Bill of Attainder ; but I think 'tis not to be used upon all Occasions, or when you may come at a Person another way ; which I think, is the Case of this Gentleman. I am of Opinion, that there does not depend more upon Sir *John Fenwick* now, than when he was first Taken. Why he was not Tryed, I shall not Examine the Reason ; I suppose it was because he gave some Assurance of his Confession. Truly, I have heard no other Reason for Proceeding against him now, but those Papers which have been adjudged Scandalous, and are so to all intents and purposes. But the Liberty of the People of *England* is very much concerned in the Revocation of that Act ; and none of the Arguments that have been used can Convince me, That I ought to give Judgment upon less Evidence than is required by that Act.

Mr. Sloane. Sir, I hardly thought I should have needed to have again troubled you with my Thoughts in this Matter, but that this Honourable Gentleman that spake last, has gone so far in his Reason, as to speak to Matter of Law, He seems to extenuate the fault

fault of Sir *John Fenwick*, and gives it as a Reason why he should not be Attainted by this Bill, for that he was none of the Principals, but only an Accessary; there is no Gentleman of the Gown, but will tell you, That there is no Accessary in Cases of Treason, but they are all Principals, and equally Guilty; and there is no Evidence in this Case to make him Accessary, but he is either Principal or nothing.

When I have made this Observation, give me leave to tell you my own Thoughts: As every Man is to be saved by his own Faith, so may my Salvation depend upon my Opinion according to my Conscience in this Matter, which is for passing this Bill.

The last time I gave you my Reasons, why I was for this Bill, and yet I have not heard them answered, though a Gentleman said, I answered myself; but I will again state the Case, and desire him to Reply to me. I did say then, Sir, and do so again, That I do not think those Scandalous Papers any Reason to provoke you to pass this Bill; and I do think, if he should be Threatened, it would be a Blemish upon his Confession. Another thing I put out of the Case, That he is a Man so dangerous to the Government, that if he escape, we are all undone. I do take him, that in his Person, Interest, and Friends, he is not so; and would not have that be a Motive for the passing of this Bill; but take it upon the Evidence that is before us, and in the Nature of our Proceedings, Then I will say, we have great Reason to Proceed upon this Bill, for the Preservation of the Government, and for this Reason. Whereas it is insisted on one side, That here are the Laws and Liberties of *England* at stake, and no body knows whose Case it may be next, Sir, if we don't go upon good Grounds and Reasons, that we don't fear any bodies following, God forbid we should make this a Precedent. But pray turn the Tables on the other side, and see what the Case will be, that here is a Gentleman that every body of the House does believe Guilty;

that he hath been in a Conspiracy to bring in the *French*, and depose the King; and the Man came before us, and we had no Power to reach him; What will be the Precedent on the other side? It will be easie to take off one of the Witnesses by Men of great Estates, and then there is no coming at them, even by the Parliament themselves: This Parliament was of Opinion, That they could not come at Sir *John Fenwick*, though they were of Opinion that he was Guilty.

But now, Sir, to that which is the Question, 'Tis allowed by every Body, you may do what you please; but without straining your Legislative Power I shall offer my Thoughts and Reasons for it, upon these three Points; That the Fact is Treason; that he is plainly Guilty; and that we have a plain Jurisdiction in this Case, in the Ordinary Methods and Proceedings of Parliament.

Sir, the Fact is Treason, the Meeting at several times, and Conspiring, and Consulting to bring in a *French* Power to Depose the King. You have been told by several Persons, and the Counsel at the Bar, That such Meetings, without some other Overt-Act, is not Treason; but I affirm the contrary, for that is an Overt-Act of Compassing the Death of the King; and Sir *Bartholomew Shower*, who did insist upon it at the Bar, did otherwise Act his Part upon it at the Tryal of Mr. *Cook*; for he offered it at first, but afterwards he deserted it, as a thing he could not stand upon; for 'tis the Opinion of all the Judges, upon a late Resolution.

Then, Sir, the Fact being Treason, as the Law already is, it is no Act *ex post Facto*. We are not making that Treason which was not so, but We are only Judging of the Fact that was Treason before; though if it was a doubt whether it was Treason or no, the Parliament hath a Power by 25 *Ed. 3.* to judge that Treason, that the Courts below have no Power of.

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The next thing is, Whether there be sufficient Evidence of this Treason before us? I will put out of the Case, as no Conclusive Evidence at all, What *Goodman* hath said upon his Oath (further than that there was such a Witness that did and could swear such a thing, and that he was Examined before the Jury;) and this I will take upon me to say, (and I will give you my Reason for my Opinion) That the Parliament is not obliged to two Witnesses by any Law now in being.

It hath been told you by my self in the former Debate, That from the Time of *Ed. 3.* one Witness in Case of Treason was sufficient till the Statute of *Ed. 6.* Now I will prove to you, from the Statute of *Philip and Mary*, That by the Common Law, and all the time between the Reign of *Ed. 3.* and *Ed. 6.* one Witness was sufficient for this or any other Treason. For that Statute of *Philip and Mary* does say, *That any Person that shall bring from beyond Sea, any False and Counterfeit Coin, or be Accused or Impeached of any Offence concerning the Impairing, Counterfeiting, or Forging of any Coin Current within this Realm, shall, and may be Indicted, Arraigned, Convicted, or Attainted by such-like Evidence, and in such-like Manner as was Accustomed before the First Year of King Edward the Sixth.* Now, What was the Reason of that Statute? Before the Statute of *Ed. 6.* those Counterfeits were to be Tried by one Witness; and therefore at this Day, and since the Statute of *P. and M.* all the Counterfeiters, and Utterers of False Coin, have been Attainted by one Witness, though it be Treason.

'Tis said again, That there is the Law of Nations, and the Law of God to the contrary. Gentlemen have said several times already, That in Murther and Felony, one Witness is sufficient, which saving some little parts of the Judgment as to the Forfeiture and Attainting of the Blood, is the same Penalty. We are not in the Land where that Law was in Force; for by that Law, as to Common Felons, there was
Restitution

Restitution only : But I would put a Gentleman that sits by the Bar this Case, by the same Law of *Deuteronomy* and *Numbers*, that he hath quoted, Adultery is Death, Will he be contented, That that should be so here ? They are either all of them in Force, or none of them in Force.

I do say, That by the Statute of *Ed. 3.* and ever after till the Statute of *Ed. 6.* one Witness was sufficient to Convict any Man of Treason. And I do say, That the Statutes of *Ed. 6.* does not conclude the Parliament from any Method of Proceedings.

The Statute says, *That no Man shall be Indicted, Arraigned Convicted, or Attainted, &c. nor shall they proceed upon such Indictment ;* from which Words in the Statute, I do plainly make it appear to any Gentleman that will read it, 'tis confined only to the Courts of *Westminster-Hall* : For certainly, you can't call a Bill of Attainder, to be a Proceeding upon an Indictment. What I say, is only to discharge my own Conscience, and to save the tender Consciences of them that hear me ; and therefore, I desire them never to say, That there ought to be two Witnesses, before they Answer what I have said upon that Statute. And I do again maintain it, That that Statute does only concern the Courts below, but does in no sort mean the Proceedings in Parliament, and no body has answered it in all these Debates.

Then, Sir, you have need but of one Witness, and you have had Capt *Porter* before you ; who, I think, notwithstanding all that hath been said, is a Credible Witness. A Gentleman made some Objections to his Credit, and told you, he was not to be believ'd, because he was in the same Conspiracy, and had been in such a Villanous Action : But, Sir, the same Gentleman hath often confined you to the Rules of *Westminster-Hall* ; and he hath told you, 'Tis a wrong Place here, and that a Man has not so good a Tryal here, as in *Westminster-Hall*. Why, the thing that was spoke of, of his being concerned in the Assassination, and of his being

being a Fellow-Conspirator with them, which is now urged as an Objection before you, is no Objection in *Westminster-Hall*.

I would only take notice of another Objection this Gentleman made to the Witness, which he said he had from the Bar, which was, That Capt. *Porter* was not Pardoned, and he was now *drudging* for his Pardon ; but that is so far from what ought to be quoted, that he that said it ought to be Reprimanded for it.

He made another Objection against his being a good Witness, and compared it to the Case of a Hunderdor ; but he did not remember, that the Man that was Robbed is a good Witness ; and the Reason is, because of the necessity of the thing, and that no others can be ; and the Defendant in a Hundred can't be a Witness, because there may be others ; and that is the Reason of this Case.

And for the Precedents in *Rich. 3d.* and *H. 4th's* Time, no Gentleman can insist upon them, considering the difference about the Crown, and the one Attainted the other ; and they were not Reversed upon the Point of Jurisdiction, but because of the different Rights of the Kings ; and no Body hath pretended to Answer the Case of the Regicides, they were not left to the Law, I mean such as were Actually Tryed before the Parliament : But the Parliament passed different Judgments on them, and some of them were in Custody. What was told you of *Cromwel's* Case and others, they go upon the same Reason, That they were not heard, though they were in Custody.

Col. Wharton. A Gentleman lately told you, We had lately passed an Act for Tryals in Cases of Treason, and now we are in this Proceeding, about doing something that is contrary to it, that is a thing that would stick with me, if I could not Answer it, but I Appeal to every Gentleman in this House, whether that Act hath any sort of Relation to Tryals in Parliament ; for that is only to Direct the Courts in *Westminster-Hall*.

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I have only this to say, I think the Evidence very full before you ; I think you have had one very good Witness, and the Counsel for the Prisoner had Liberty to confront him : If he had not been Guilty, the Prisoner at the Bar would have denyed it ; I am convinced of the Truth of it, and my Conscience is to make a Judgment upon it, and that is all we can go by here.

Mr. Jefferys. A Worthy Gentleman of the Long Robe hath taken pains to find out Precedents to justify our Proceedings ; and another says, there is no Act to Circumscribe our Proceedings ; but since Gentlemen differ so much, it gives me a great deal of Caution. This I know, there is a Law of the Land, by which Persons ought to be governed : I take this to be an Extraordinary Method of Proceedings, and I hope the Lords will take more Care of the Matter, than the Commons.

Mr. Edw. Harley. Sir, I can't satisfy my self to be for this Bill, and in a few Words, I shall give my Reason for it : It hath been said, That the Parliament is unlimited ; I do agree that we are not tyed to the Rules of *Westminster-Hall* ; I shall only mention the Reason why two Witnesses are required in Cases of High Treason. If any will look into the History of *England*, they will find it hath been often the Design of the Crown, to Trump up Plots upon the Subject, and therefore these Acts took particular Care there should be two Witnesses to prove the Fact. This is the Reason of the Law, and I think, upon it the Liberty of the Subject is founded, and therefore I can't be for this Bill.

Then the Question for passing this Bill was put, and the House Divided.

Ayes 189.

Noes 156.



Sir John Fenwick's LETTER
to his Lady, upon his being
Taken in Kent, mentioned by
the Counsel for the Bill.

What I feared, is at last happen'd, had I gone alone, I had done it; but the other was betray'd from London, it is God's Will, so we must submit: I know nothing can save my Life, but my Lord Carlisle's going over to him, back'd by the rest of the Family of the Howards, to beg it; and offering that I will live abroad all his Time, where I cannot hurt him, and that I will never draw Sword against him. I must leave it to you what else to say, all Friends must be made, My Lord Devonshire may perhaps by my Lady, my Lord Godolphin, my Lord Pembroke by my Lady Montgomery, Mr. Nelson by the Bishop of Canterbury, my Lord Arran might engage his Brother Selkirk to use his Interest with Keppel. I believe, if my Lord Carlisle would go, it were best before my Tryal, or else they may cut me short for want of Time; if he can prevail with him for a Pardon, he will procure it as well before my Tryal, as after, or at least he may prevail for a Reprieve, till some can come over to him. My Lord also will have an Opportunity to engage Benting, and get my Lord of Essex to joyn with him. I cannot think what else to say; but the great Care must be the Jury, if two or three could be got, that would starve the rest; That or nothing can save me. Money I know would do it, but alas, that is not to be had, nor shall I get enough for Counsel. I beg of you not to think of being shut up with me, I know it will kill you

you, and besides I have no such Friend as you to take care of my Business, tho' it would be the Comfort of my Life, the little time it lasts, to have you with me: And I have this only Comfort now left, that my Death will make you easie. My Dearest Life, grieve not for me, but resign me to God Almighty's Will. You will hear as soon as they bring me to Town, where they put me, and then I would have a Servant, or some Body with me, and my Night-Gown. I am in a sad Case with Riding; That Day I parted with you, I rid above a Hundred Miles; but be not concern'd, my Health is well enough, I am interrupted, so can say no more now. Engage Sir John Lowther the new Lord, who hath more Interest than any Body. Let my Lord Scarsdale engage Jermaine to engage Overkirke for me, speak to my Lady Arlington. If my Tryal could be put off till the King comes back, there would be more Opportunity to sollicite him.

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A Copy of the PAPER delivered by Sir John Fenwick,
Baronet, to the Sheriffs of London and Middlesex,
on Tower-Hill, the Place of Execution, Thursday
January 28. 1697.

Speaking nor Writing was never my Talent. I shall therefore give a very short, but faithful Account, First, of my Religion, and next, what I Suffer most Innocently for, to avoid the Calumnies I may reasonably expect my Enemies will cast upon me when Dead; since they have most falsely and maliciously aspersed me, whilst under my Misfortunes.

As for my Religion, I was brought up in the Church of *England*, as it is Established by Law, and have ever professed it; though I confess, I have been an unworthy Member of it, in not living up to the Strict and Excellent Rules thereof, for which I take shame to my self, and humbly ask forgiveness of God. I come now to Die in that Communion, trusting as an Humble and Heartly Penitent, to be received by the Mercy of God, through the Merits of Jesus Christ my Saviour.

My Religion taught me my Loyalty, which I bless God is untainted; and I have ever endeavoured in the Station wherein I have been placed, to the utmost of my Power, to Support the Crown of *England* in the True and Lineal Course of Descent, without Interruption.

As for what I am now to Die, I call God to Witness, I went not to that Meeting in *Leaden-Hall-Street* with any such Intention as to Invite King *James* by Force to Invade this Nation; nor was I my self provided with either Horse or Arms, or engaged for any Number of Men, or gave particular Consent for any such Invasion, as is most falsely Sworn against me.

I do also declare in the Presence of God, That I knew nothing of King *James* his coming to *Callis*, nor of any Invasion intended from thence, till it was Publicly known: And the only Notion I had that something might be attempted, was from the *Thoulon* Fleet coming to *Brest*.
I also

I also call God to Witness, That I received the knowledge of what is contained in those Papers that I gave to a Great Man, that came to me in the *Tower*, both from Letters and Messages that came from *France*; and he told me when I read them to him, that the Prince of *Orange* had been acquainted with most of those things before.

I might have expected Mercy from that Prince, because I was Instrumental in saving his Life. For when about *April*, 95. an Attempt formed against him, came to my Knowledge, I did partly by Dissuasions, and partly by Delays, prevent that Design; which I suppose was the Reason that the last Villanous Project was concealed from me.

If there be any Persons whom I have injur'd in Word or Deed, I heartily pray their Pardon, and beg of God to Pardon those who have injured me; particularly those who with great Zeal have sought my Life, and brought the Guilt of my Innocent Blood upon this Nation, no Treason being proved upon me.

I return my most hearty Thanks to those Noble and Worthy Persons who gave me their Assistance by opposing this Bill of Attainder, without which, it had been impossible I could have fallen under the Sentence of Death. God bless them and their Posterity; though I am fully satisfied they Pleaded their own Cause while they Defended mine.

I pray God to bless my True and Lawful Sovereigns, King *James*, the Queen, and Prince of *Wales*, and Restore him and his Posterity to this Throne again, for the Peace and Prosperity of this Nation, which is impossible to prosper till the Government is settled upon a right Foot.

And now, O God I do with all Humble Devotion Commend my Soul into thy Hands, the Great Maker and Preserver of Men, and Lover of Souls, beseeching thee, That it may be always dear and precious in thy Sight, through the Merits of my Saviour *Jesus Christ*, Amen.

J. FENWICK.

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